Jurisdictional Statement

81-1999

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. _____

THE SEYMOUR NATIONAL BANK,
As Guardian for Timothy Clyde O'Sullivan,
THE SEYMOUR NATIONAL BANK,
As Special Administrator of the Estate
of Deborah O'Sullivan,
and JOHN L. O'SULLIVAN,
Plaintiffs-Appellant

v.

STATE OF INDIANA,
Defendant-Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF INDIANA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Indiana Tort Claims Act, Indiana Code 34-4-16.5, gives financial protection to the State and all other governmental entities by limiting the amount of recovery in tort claims and provides for the purchase of insurance to cover claims within the statutory limit. This Act also eliminates any inhibition that the employees of the State and every other governmental entity may have in carrying out the duties of their employment by immunizing these employees from liability for losses resulting from conduct, within the scope of employment, which was done to enforce a law.

Three of the five justices of the Supreme Court of Indiana have interpreted Indiana Code 34-4-16.5-3(7) to mean that the State of Indiana, is also not liable for any losses which result from, not only any negligent conduct which can be

characterized as enforcement of a law, but also from any willful, wanton or malicious conduct, done within the scope of employment, which can be characterized as enforcement of a law. This interpretation bars the victim of torts, committed by employees of every governmental entity, from recovering damages, even though the damages sought are within the statutory limit, and are covered by insurance.

The question presented is whether Indiana Code 34-4-16.5-3(7), as interpreted by the Supreme Court of Indiana, is in conflict with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Opinion Below.	1
Jurisdiction	3
Constitutional and Statutory Provisions Involved.	5
Statement of the Case.	9
The Question is Substantial. . .	15
Conclusion	27
Appendix	1a

TABLE OF AUTHORITIES

Page

Board of Commissioners of Delaware County v. Briggs (1975), ____ Ind.App. ____, 337 N.E.2d 852. 17

Baxstrom v. Herold (1966), 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 26

Brinkman v. City of Indianapolis (1967), 141 Ind.App. 662, 231 N.E.2d 169 17

Campbell v. State (1972), ____ Ind. ____, 284 N.E.2d 733 . . . . . .17, 18

Flowers v. Board of Commissioners of the County of Vanderburgh (1960), 240 Ind. 668, 168 N.E.2d 224 17

Illinois Tort Immunity Act, Ill. Rev. Stat., (1971) Ch. 85, Sec. 2-202 25

Indiana Code 34-4-16.5. . . . 3, 5, 6, 7, 8, 18

Indiana Code 34-4-16.5-3(7) 11, 12, 15, 20, 22, 23

Indiana Code 34-4-16.5-4 . . . .18, 19

Indiana Code 34-4-16.5-18 19

Indiana Constitution, Section 1, Article I 24

Indiana Tort Claims Act 11, 13, 14, 18, 19, 20

Indiana Tort Claims Act, Sec. 2 . . . . . .6, 7

Indiana Tort Claims Act, Sec. 3(7). 3, 5

Indiana Tort Claims Act, Sec. 4 7

Indiana Tort Claims Act, Sec. 18. 8

Kleplinger v. Board of Commissioners of the County of Miami (1968), 143 Ind.App. 155, 239 N.E.2d 160 17

Louisville Gas & Electric Co. v. Coleman (1928), 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 26

Martinez v. State of California (1980), _____ U.S. _____, 100 S.Ct. 553. 20

Perkins v. State (1969), 252 Ind. 549, 251 N.E.2d 30 17

Rinaldi v. Yeager (1966), 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 . . . . . .20, 26

Roberts v. State (1974), _____ Ind.App. _____, 307 N.E.2d 501. 17

Rohrlack v. Goff (D.C.D.C. 1961), 197 F.Supp. 670. 25

United States Constitution, Fourteenth Amendment (Equal Protection Clause). 3, 11, 12, 20, 26

United States Constitution, Fourteenth Amendment, Section 1. 5

United State Department of Agriculture v. Moreno (1973), 413 U.S. 528, 93 S.Ct. 2821 16

28 U.S.C. Sec. 1257(2) 4

384 N.E.2d 1177. 2

422 N.E.2d 1223. . . . . 2, 22

428 N.E.2d 203 2

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OPINIONS BELOW

The summary judgment of the Bartholomew Circuit Court, of Bartholomew County, Indiana, is not officially reported.

The opinion of the Court of Appeals of Indiana dated January 31, 1979, is reported at 384 N.E.2d 1177.

The opinion of the Supreme Court of Indiana, dated July 10, 1981, is reported at 422 N.E.2d 1223.

The opinion of the Supreme Court of Indiana, dated November 24, 1981, is reported at 428 N.E.2d 203.

All of the opinions below are reprinted in the Appendix attached hereto.

JURISDICTION

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of Indiana holding that Section 3(7) of the Indiana Tort Claims Act, Indiana Code 34-4-16.5, is constitutional. On appeal to the Court of Appeals of Indiana from the summary judgment granted to the State of Indiana, appellants raised the question of the validity of that statute on the ground of its repugnance to the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The original opinion of the Supreme Court of Indiana was entered on July 10, 1981. On July 23, 1981, appellants petitioned for rehearing, and on November 24, 1981, a modified opinion, from which appellants are appealing, was entered as the final judgment. On December 14, 1981, appellants petitioned for rehearing,

which petition was denied by the order of the Supreme Court of Indiana dated January 29, 1982.

Notice of appeal was filed with the Clerk of the Supreme Court of Indiana on April 16, 1982. This Court has jurisdiction of this appeal under the provisions of 28 U.S.C. Sec. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 3(7) of the Indiana Tort Claims Act, Indiana Code 34-4-16.5, provides in pertinent part that:

> "Sec. 3. A governmental entity or an employee is not liable if a loss results from:
>
> * * *
>
> (7) the enforcement of or failure to enforce a law."

Section 2 of the Indiana Tort Claims Act, Indiana Code 34-4-16.5, provides in pertinent part that:

> "Sec. 2. As used in this chapter:
>
> (1) 'employee' and 'public employee' means a person presently or formerly acting on behalf of a governmental entity whether temporarily or permanently or with or without compensation, including members of boards, committees, commissions, authorities and other instrumentalities of governmental entities, but does not include an independent contractor or any agent or employee of an independent contractor;
>
> (2) 'governmental entity' means the state or a political subdivision of the state;
>
> * * *
>
> (4) 'loss' means injury to or death of a person, or damage to property;
>
> (5) 'political subdivision' means a:
>
> (i) county,
> (ii) township,
> (iii) city,
> (iv) town,
> (v) separate municipal corporation,
> (vi) special taxing district,

(vii) state college or university,
(viii) city or county hospital,
(ix) school corporation, or
(x) board or commission of one of the entities listed in clauses (i) through (ix), inclusive, of this subdivision;

(6) 'state' means Indiana and its state agencies; and

(7) 'state agency' means a board, commission, department, division, bureau, committee, authority, military body, or other instrumentality of the state, but does not include a political subdivision."

Section 4 of the Indiana Tort Claims Act, Indiana Code 34-4-16.5, provides that:

"The aggregate liability of all governmental entities does not exceed three hundred thousand dollars ($300,000) for injury to or death of one (1) person in any one (1) occurrence and does not exceed five million dollars ($5,000,000) for injury to or death of all persons in that occurrence. A governmental entity is not liable for punitive damages."

Section 18 of the Indiana Tort Claims Act, Indiana Code 34-4-16.5, provides in pertinent part that:

> "A governmental entity may purchase insurance to cover the liability of itself or its employees. . . ."

STATEMENT OF THE CASE

While conducting a high speed chase of a motorist who had been stopped because of an improper bumper height and then fled, Sargent L. Richey, an Indiana State trooper, slowed his automobile to approximately one hundred miles per hour as he entered the Town of Austin, Indiana, and collided with an automobile owned by John L. O'Sullivan, operated by Timothy Clyde O'Sullivan and occupied by Timothy Clyde O'Sullivan's wife, Deborah O'Sullivan, and infant daughter, Melissa O'Sullivan. Both Deborah O'Sullivan and Melissa O'Sullivan were killed, and Timothy Clyde O'Sullivan sustained multiple injuries, including brain damage, which necessitated the appointment of a guardian for him. On January 27, 1976, The Seymour National Bank was appointed guardian of the person and estate of Timothy Clyde O'Sullivan,

and on February 4, 1976, The Seymour National Bank was appointed special administrator for the estate of Deborah O'Sullivan.

On June 29, 1976, The Seymour National Bank filed a complaint against the State of Indiana in the Circuit Court of Jackson County, Indiana, to recover for the wrongful death of Deborah O'Sullivan and Melissa O'Sullivan and for the personal injuries sustained by Timothy Clyde O'Sullivan. John L. O'Sullivan joined as a plaintiff to recover for the property damage he sustained. The complaint alleged that the damages sustained by the appellants were proximately caused by the negligence and the willful and wanton misconduct of Sargent L. Richey while he was acting within the scope of, and during the course of, his employment with the State of Indiana.

The case was then venued to the Circuit Court of Bartholomew County, Indiana. The State of Indiana filed a motion for summary judgment, and on December 20, 1977, the Circuit Court of Bartholomew County, Indiana, granted a summary judgment which held that due to the fact that the losses claimed by the appellants resulted from an act of law enforcement, the State of Indiana is immune from liability under the terms of the Indiana Tort Claims Act, Indiana Code 34-4-16.5-3(7). (See page 5).

On February 21, 1978, the appellants filed a motion to correct errors in the Circuit Court of Bartholomew County, Indiana, and alleged that the summary judgment was in error on several grounds, including the ground that Indiana Code 34-4-16.5-3(7), is in conflict with the Equal Protection Clause of the Fourteenth

Amendment of the United States Constitution. (See page 5). The motion to correct errors was denied. (App. A, infra, 84a). On June 15, 1978, an appeal was filed in the Court of Appeals of Indiana, and appellants raised the same constitutional issue by briefs. On January 31, 1979, the First District of the Court of Appeals of Indiana, by a unanimous decision, reversed the Circuit Court of Bartholomew County, Indiana, and held that under the common law of Indiana, the appellants had a cause of action, and that Indiana Code 34-4-16.5-3(7), strictly construed, is in harmony with the common law of Indiana. (App. A, infra, 47a-83a). The constitutional issue was not addressed by the Court of Appeals of Indiana, the case having been decided on other grounds. By an order dated March 26, 1979, the Court

of Appeals of Indiana denied the appellee's petition for rehearing (App. A, infra, 46a), and the appellee petitioned the Supreme Court of Indiana for transfer. On October 30, 1979, oral argument was held before the Supreme Court of Indiana, and on July 10, 1981 the Supreme Court of Indiana, by a three to two split decision, with two dissenting opinions, vacated the decision of the Court of Appeals of Indiana. (App. A, infra, 18a-45a). In reaching its decision, the majority opinion of the Supreme Court of Indiana omitted the issue of the constitutionality of the Indiana Tort Claims Act.

On July 23, 1981, the appellants filed a petition for rehearing, which was granted on November 24, 1981. In a three to two split decision, the majority of the Supreme Court of Indiana slightly modified its first opinion and held that

there might be some acts of law enforcement that were so outrageous as to be outside the scope of employment, but the summary judgment was affirmed. The Supreme Court of Indiana disposed of the issue of the constitutionality of the Indiana Tort Claims Act by stating that appellants assume that the Indiana Tort Claims Act applies to cases which were not before the Court. (App. A, infra, 1a-15a).

On December 14, 1981, a second petition for rehearing was filed with the Supreme Court of Indiana, and that petition was denied by an order dated January 29, 1982. (App. A, infra, 16a-17a).

THE QUESTION IS SUBSTANTIAL

This Court has never issued an opinion which dealt with the question presented in this case.

Three of the five justices of the Supreme Court of Indiana have interpreted Indiana Code 34-4-16.5-3(7) to mean that the State of Indiana, all other governmental entities within the State, and all of their employees are not liable for any losses which result from, not only any negligent conduct which can be characterized as enforcement of a law, but also from any willful, wanton or malicious conduct, done within the scope of employment, which can be characterized as enforcement of a law. This interpretation creates a doctrine of sovereign and governmental immunity that results in different consequences for victims of torts. A victim of a tort committed by anyone who is not acting as

an employee of the State of Indiana or any other governmental entity may be compensated for damages. However, a victim of an identical tort committed by anyone acting within the scope of his employment by the State or any other governmental entity is barred from being compensated for damages. The question is whether this difference in the treatment of victims' torts is rational in light of the purpose of the legislature in creating this classification, and to answer this question, a consideration of the facts and circumstances behind the statute, the interest the State claims to be protecting and the interests of those disadvantaged by the classification must be made. United State Department of Agriculture v. Moreno (1973), 413 U.S. 528, 93 S.Ct. 2821.

There have been major changes in the doctrines of governmental and sovereign

immunity in Indiana and in the majority of the other states during the last several years. Governmental and sovereign immunity existed under the common law of Indiana, and the Court of Appeals and Supreme Court of Indiana, in a series of cases,[1/] made many broad exceptions to these doctrines. The State of Indiana has argued consistently throughout the development of the law that the exceptions being made by the Indiana Courts exposed the State of Indiana to unbearable financial burdens

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1/ Flowers v. Board of Commissioners of the County of Vanderburgh (1960), 240 Ind. 668, 168 N.E.2d 224; Brinkman v. City of Indianapolis (1967), 141 Ind.App. 662, 231 N.E.2d 169; Kleplinger v. Board of Commissioners of the County of Miami (1968), 143 Ind.App. 155, 239 N.E.2d 160; Perkins v. State (1969), 252 Ind. 549, 251 N.E.2d 30; Campbell v. State (1972), ___ Ind. ___, 284 N.E.2d 733; Roberts v. State (1974), ___ Ind.App. ___, 307 N.E.2d 501; Board of Commissioners of Delaware County v. Briggs (1975), ___ Ind.App. ___, 337 N.E.2d 852.

and would inhibit employees of governmental entities from carrying out their duties because of the fear of being liable for losses that may result from carrying out the duties which were within the scope of their authority. The Supreme Court of Indiana answered these arguments in its decision in Campbell v. State (1972), ____ Ind. ____, 284 N.E.2d 733, by stating that it was for the legislature to solve these problems.

After the Campbell decision, the Indiana Legislature passed the Indiana Tort Claims Act, Indiana Code 34-4-16.5, which became effective in 1974. Indiana Code 34-4-16.5-4, (See page 7), gave the State and all other governmental entities the financial protection that the State has argued for during the development of the common law on sovereign and governmental immunity by providing that all governmental entities are not liable

for punitive damages and that the aggregate liability of all governmental entities shall not exceed $300,000 for injury to or death of one person, and shall not exceed $5,000,000 for injury to or death of all persons in that occurrence. Indiana Code 34-4-16.5-18, (See page 8), gave additional financial protection to all governmental entities by providing for the purchase of insurance to cover the liability within the limits specified by Indiana Code 34-4-16.5-4. These sections of the Tort Claims Act combine to limit the financial exposure of the State and all other governmental entities to minimal levels.

Even though a state has a legitimate concern about the exposure to liability that its employees and the employees of all other governmental entities had under the common law, and the effect which that exposure to liability may have on the

decision-making process of employees in carrying out the duties of their positions, Martinez v. State of California (1980), ___ U.S. ___, 100 S.Ct. 553, this concern was completely eliminated by Indiana Code 34-4-16.5-3(7), which eliminated the liability of every employee of every governmental entity for, among other things, any loss which resulted from the enforcement of or failure to enforce a law.

Statutory classifications violate the Equal Protection Clause if they are not rationally related to some legitimate state purpose. Rinaldi v. Yeager (1966), 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577. Therefore, since the foregoing sections of the Indiana Tort Claims Act accomplished every conceivable legislative purpose in creating a difference in the treatment of the

victims of torts, there remains no rational relationship between the classification and the purpose of the legislature in creating it which would reasonably justify immunizing the State itself from liability within the limits specified.

Furthermore, the absence of a rational basis for immunizing the State from liability for the appellants' claims is especially certain due to the fact that the State purchased insurance which provides coverage for the appellants' claims. (App. A, infra, 103a-106a). A victim of a tort committed by an insured person who is not acting as an employee of the State of Indiana or any other governmental entity may recover for damages, at least to the extent of the limits of applicable insurance coverage. Therefore, to the extent that insurance coverage exists for claims against the

State, there is absolutely no rational basis for a classification which denies any remedy to every victim of a tort committed by an employee of a governmental entity while attempting to enforce a law.

Although the appellants were victims of a tort committed by an Indiana State Police officer, it was correctly pointed out by Justice Hunter in his dissenting opinion, 422 N.E.2d 1223, at 1228, (App. A, infra, 39a -45a) that "enforcement" of laws is not the exclusive bailiwick of police officers, and that there is a wide range of government-controlled activities that fall within the scope of Indiana Code 34-4-16.5-3(7), as interpreted by the Supreme Court of Indiana. Therefore, every person in Indiana, either as a resident or as a visitor, is unavoidably exposed to the dangers and potential

abuses of power arising from the many and varied activities, which can be characterized as enforcement of a law, of the State and other governmental entities. The several million people residing in and passing through Indiana each year comprise a substantial percentage of the population of the United States.

The absence of a rational relationship between the classification of victims of torts, which classification is created by Indiana Code 34-4-16.5-3(7), and the purpose of the legislature in creating the classification, is also made apparent by the fact that Indiana Code 34-4-16.5-3(7), as interpreted by the Supreme Court of Indiana, immunizes the State and all other governmental entities and all of their employees from liability for losses which result from, not only

negligent conduct, but also from any willful, wanton or malicious conduct, done within the scope of employment, which can be characterized as enforcement of a law. There can be no rational basis for the government of Indiana, which under the terms of Section 1, of Article I, (App. A, infra, 107a), is instituted for the peace, safety and well-being of its people, to classify victims of torts in a way which denies them any remedy for losses which result from conduct which is done maliciously, willfully or with wanton disregard for public safety.

The District of Columbia and every state, with the exception of Kansas, which has a tort claims act makes an exception to either sovereign or governmental immunity, or both, for losses which result from wanton, willful or malicious misconduct or from gross

negligence. One of many possible examples is the Illinois Tort Immunity Act, Ill. Rev. Stat., (1971) Ch. 85, Sec. 2-202, (App. A, infra, 108a), which grants governmental immunity only where an act or omission in the enforcement of a law is neither willful nor wanton. Such grants of immunity have been held to be a reasonable exercise of police power where there is an exception to the grant of immunity in cases involving gross negligence. Rohrlack v. Goff (D.C.D.C. 1961), 197 F.Supp. 670.

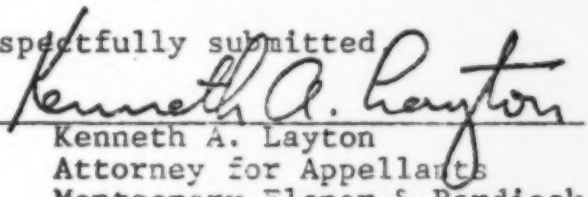
This nearly universal limitation on the extent of the grant of sovereign and governmental immunity is compelling evidence of the total absence of a rational relationship between a classification of tort-victims and the purpose of a legislature in creating such a classification. In the absence of such a relationship, the statute which creates

the classification is repugnant to the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. Rinaldi v. Yeager, supra; Baxstrom v. Herold (1966), 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; Louisville Gas & Electric Co. v. Coleman (1928), 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770.

CONCLUSION

The question presented by this appeal is one of first impression, substantial and of importance to every resident of the State of Indiana and to every person who passes through the State of Indiana. Probable jurisdiction should be noted.

Respectfully submitted,



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Appendix

IN THE

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THE SEYMOUR NATIONAL BANK,
as Special Administrator of the
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JOHN L. O'SULLIVAN
Plaintiffs-Appellants

v.

STATE OF INDIANA
Defendant-Appellee

No. 781 S 185

(ENTERED NOVEMBER 24, 1981)

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable William M. Lienberger, Judge

ON PETITION FOR REHEARING

PRENTICE, J.

The case is before us upon the petition of the Plaintiffs (Appellants) for rehearing and Defendant's (Appellee's) response thereto.

We now grant the petition for rehearing for the purpose of clarifying our opinion of July 10, 1981 (reported at 422 N.E. 2d 1223) and to address three issues presented by Plaintiffs' initial brief, and which were inadvertently omitted from our prior opinion, to-wit:

> "2. Whether the existence of liability insurance which provides coverage for the losses claimed by the plaintiffs, constitutes a waiver, to the extent of the limits of insurance coverage, of any immunity granted by IC 34-4-16.5-3(7).
>
> "3. Whether IC 34-4-16.5-3(7) is unconstitutional as violative of Section 12 of Article I of the Indiana Constitution which guarantees all person a remedy for injuries to their person and property.
>
> "4. Whether IC 34-4-16.5-3(7) is unconstitutional in that it denies the plaintiffs equal protection of the law by granting privileges and immunities prohibited by Section 23 of Article I of the Indiana Constitution and Section 1 of the Fourteenth Amendment of the United States Constitution."

MODIFICATION OF PRIOR OPINION

We continue to reject Petitioners' claims that the Legislature merely codified the case law when it passed Ind. Code 34-4-16.5-3(7). The language of the statute as amended is clear.[1/] The State of Indiana and its employees are not liable for losses resulting from the enforcement of or failure to enforce a law, unless such enforcement constitutes false arrest or false imprisonment. It does not follow, however, that the statute necessarily grants immunity for all acts of law enforcement officers

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1/ Other state Legislatures have created liability for the negligent operation of a vehicle. Mich. Comp. Laws Ann. Sec. 691.1405 (West 1968) (all employees, agents, and officials driving state owned vehicles); Minn. Stat. Ann. Sec. 375.31 (West 1968) (county may indemnify officer for damage caused by negligent operation of a motor vehicle); N. Y. Gen. Mun. Law Sec. 50c (McKinney 1977) (policemen and firemen other than the City of New York); Pa. Stat. Ann. tit. 42 Sec. 5522 (Purdon 1980) (notice of claim against municipality for negligence of employee).

committed while engaged in the enforcement of the law. If the injury in question resulted from the enforcement of a law, immunity is granted to both the governmental entity and to the employee, notwithstanding that the enforcement resulted in a loss that would not have occurred but for the negligent manner in which the duty was performed. However, an employee's acts, although committed while engaged in the performance of his duty, might be so outrageous as to be incompatible with the performance of the duty undertaken. In such a case, it cannot be said that an injury resulting therefrom resulted from the performance of the duty. Such acts, whether intentional or willful and wanton, are simply beyond the scope of the employment.[2/]

2/ For a consideration of factors determinative of whether or not

Plaintiffs characterize our determination, that the statute is not ambiguous and must be given its plain meaning, as being prejudicial to the public interest in that it immunizes governmental entities and its employees from all liability for all losses that result from any act which can possibly be characterized as enforcement of the law. We cannot agree. Our interpretation does result in the grant of such immunity for losses that result from any act which can properly be characterized as enforcement

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2/ (Continued)

questionable acts of the employee, were within the scope of employment, see Restatement of the Law 2d, Agency, Subsec. 228-237 and 245.

Some jurisdictions have held that governmental entities are not liable for injuries occasioned by the use of excessive force by police officers engaged in the performance of their duties upon the theory that such action is outside the scope of their duties. Annotation at 88 ALR 2d 1330.

of the law, but we do not regard this as being against the public interest, and it is clearly a matter that the Legislature may determine. With regard to those acts that are so incompatible with the performance of duty as to be outside the scope of the employment, there is no statutory grant of immunity either to the employee or to the governmental entity, which has no need for it, inasmuch as there is no basis for liability in it.

The issue which the trial court faced and which we face in review of Defendant's motion for summary judgment is whether a jury could have found from the facts construed in a light most favorable to Plaintiffs that the losses sued for resulted from acts of Trooper Richey for which Defendant, the State of Indiana, was liable. It is clear that even if the accident resulted from the negligence of the trooper for which the

defendant would otherwise be liable, it was, nevertheless, immune under the express terms of the statute.

We now turn to a consideration of the previously omitted issues:

ISSUE II

Plaintiffs contend that liability insurance held by the defendant would reimburse it for any loss that it might sustain by reason of an adverse judgment herein and that the immunity granted by the statute has been waived, to the extent that losses are reimbursable, either by the statutory authorization for such insurance, contained in the Tort Claims Act, or by considerations of public policy favoring the spreading of losses by means of insurance. We find no merit to this argument, as the determination of public policy is the prerogative of the Legislature, and there is nothing about the Tort Claims Act

providing for such waiver or expressing such a public policy.

Additionally, although Defendant by an answer to interrogatories, acknowledged the existence of liability insurance with respect to the accident, neither the question nor the answers compel the conclusion that the insurance was an unconditional agreement to indemnify.

ISSUE III

Petitioners contend that Ind. Code Sec. 34-4-16.5-3(7) violates Article I, Section 12 of the Indiana Constitution:

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily and without delay."

A similar challenge was advanced and correctly rejected in Krueger v.

Bailey, (1980) Ind. App., 406 N.E. 2d 665, 670-71.

ISSUE IV

Lastly, Petitioners contend that Ind. Code Sec. 34-4-16.5-3(7) violates the Equal Protection Clause of the Fourteenth Amendment:

> "Plaintiffs submit that there is no rational basis for a classification which immunizes an employee of a governmental entity, with or without statutory arrest powers, for damages caused by his conduct while leaving all other citizens of the State, who are not employed by a governmental entity, liable for damages resulting from their conduct in exercising their right to enforce the law."

Petitioners' argument assumes that the statute applies to cases which are not before us. His complaint was not against a citizen but against the State.

The petition for rehearing is granted. The judgment of the trial court is affirmed.

CIVAN, C. J., and PIVARNIK, J., concur;
DeBruler, J., votes to grant rehearing and reverse the trial court;
HUNTER, J., concurs in part and dissents in part with opinion.

IN THE

SUPREME COURT OF INDIANA

THE SEYMOUR NATIONAL BANK,
as Guardian for Timothy Clyde O'Sullivan,
THE SEYMOUR NATIONAL BANK,
as Special Administrator of the Estate
of Deborah O'Sullivan,
JOHN L. O'SULLIVAN,
Appellants (Plaintiffs below),

v.

STATE OF INDIANA,
Appellee (Defendant below).

No. 781 S 185

(ENTERED NOVEMBER 24, 1981)

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
THE HONORABLE WILLIAM M. LIENGERGER, JUDGE

HUNTER, J. -- Dissenting in Part;
Concurring in Part.

I concur with the majority in its conclusion that the scope of immunity established by the legislature in Ind. Code Sec 34-4-16.5-3(7) (Burns 1980

Supp.) does not embrace conduct of a willful and wanton nature. I must respectfully dissent from the majority opinion in two respects, however:

1. I am not persuaded the statutory phrase "enforcement of a law" is unambiguous; and

2. I am unable to join the conclusion the trial court should be affirmed in its decision to grant summary judgment.

The rationale for my position was fully explained in my dissent to this Court's original opinion in this cause. Seymour Nat. Bank v. State, (1981) ___ Ind. ___, 422 N.E. 2d 1223, 1227 (DeBruler, J., dissenting). For purposes of brevity, it is not necessary here to reiterate that analysis in toto.

Suffice it to say the term "enforcement," however it might admit of a succinct definition, simply cannot be

applied with any degree of exactitude or consistency to the wide range of governmentally-regulated activities. In the factual context before us -- a high speed police chase prompted by facts sufficient to justify police action -- we can resolutely describe the conduct as clearly within the ambit of the term "enforcement" of a law. With equal certainty it can be opined that time will yield up circumstances wherein litigation will turn on esoteric debate over whether particular governmental conduct constituted the "enforcement," "administration," or "implementation" of a law. Id. That the resolution of those disputes will be guided by the likes of Webster and Roget points up the ambiguity of the term "enforcement" which attaches not on its face, but in its application.

Conceding the applicability of the term to the instant case, it still cannot

be said as a matter of law the police conduct at issue fell within the limited scope of the statute. Whether the police officer's conduct constituted mere negligence, as within the statute, or willful and wanton misconduct, as outside the scope of immunity is a question of fact peculiarly incapable of resolution via summary judgment. That conclusion is necessitated by the strictures of Ind. R. Tr. P. 56 and our common law. See, e.g., Stapinski v. Walsh Const. Co., Inc., (1979) ___ Ind. ___, 395 N.E. 2d 1251; Clouse v. Peden, (1962) 243 Ind. 390, 186 N.E. 2d 1. Consequently, like the Court of Appeals, I believe the summary judgment rendered by the trial court was inappropriate.

This case is one of those upon which legal minds can properly differ. It is also one with significant ramifications. The legislature would do

well to examine the language employed in Ind. Code Sec 34-4-16.5-3(7), supra, and clarify its import; meanwhile, troublesome questions surrounding the issue before us lie ahead.

For the foregoing reasons, I would vacate our original opinion and reinstate the opinion of the Court of Appeals found at Seymour Nat. Bank v. State, (1979) ___ Ind. App. ___, 384 N.E. 2d 1177.

I dissent in part and concur in part.

(ENTERED JANUARY 29, 1982)
IN THE

SUPREME COURT OF INDIANA

No. 781S185

The Seymour National Bank, et al V.
State of Indiana

You are hereby notified that the Supreme Court has on this day denied Appellant's Petition for Cral Argument. Givan, C.J.

Appellee's Motion to Strike and Dismiss Appellants' Second Petition for Rehearing is hereby denied. Givan, C.J. DeBruler, J., votes to sustain motion.

Appellants' Second Petition for Rehearing is hereby denied. Givan, C.J. DeBruler, J. Votes to Sustain Motion to Strike. Hunter, J., Votes to Grant Transfer.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 29th day of January, 1982.

/S/ Marjorie H. O'Laughlin
Clerk, Supreme Court

IN THE

SUPREME COURT OF INDIANA

THE SEYMOUR NATIONAL BANK,
as Guardian for
TIMOTHY CLYDE O'SULLIVAN
THE SEYMOUR NATIONAL BANK,
As Special Administrator of the
Estate of Deborah O'Sullivan
JOHN L. O'SULLIVAN
Plaintiffs-Appellants

v.

STATE OF INDIANA
Defendant-Appellee

No. 781 S 185

(No. 1-578 A 125)

(ENTERED JULY 10, 1981)

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable William M. Lienberger, Judge

PRENTICE, J.

This cause is before us upon the petition of the Defendant (Appellee), State of Indiana, to transfer the cause from the Court of Appeals, First District, that Court having reversed the trial court's granting of summary

judgment in the defendant's favor, by opinion reported at 384 N.E. 2d 1177.

Transfer is hereby granted pursuant to Ind. R. App. P. 11(B)(2)(b) in that the Court of Appeals has erroneously decided a new question of law, i.e. the interpretation to be placed upon the term "enforcement of a law," as used in the Indiana Tort Claims Act, Ind. Code Sec. 34-4-16.5-3(7).[1/]

The relevant facts were set forth

1/ We note that, at the time of the events at bar, Ind. Code Sec. 34-4-16.5-3(7) provided in pertinent part: "IMMUNITY FROM LIABILITY.--A governmental entity or employee is not liable if a loss results from: . . . (7) the enforcement of or failure to enforce a law." The statute was amended in 1976 and now provides in pertinent part: "IMMUNITY FROM LIABILITY. A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from: . . . (7) the adoption and enforcement of or failure to adopt or enforce a law, including rules and regulations, unless the act of enforcement constitutes false arrest or false imprisonment." Ind. Code Sec. 34-4-16.5-3(7) (Burns Supp. 1980).

by the trial court in its determination of Defendant's motion for summary judgment as follows:

> "This cause having been submitted to the Court on the motion for summary judgment filed by the defendant, the State of Indiana, and upon pleadings, interrogatories and answers thereto, and affidavits in support of said motion for summary judgment, and the Court, having heard oral arguments thereon and having considered briefs filed by the parties herein, now finds:
>
> "1. On November 28, 1974, Sargent L. Richey (hereinafter Trooper Richey) was employed by the State of Indiana as a State Trooper for the Indiana State Police. Sometime after 11:00 A.M. on said date in the course and scope of his employment, Trooper Richey was on patrol in Jackson County, Indiana near the Uniontown exit of Interstate Highway 65.
>
> "2. At about the same time, C. W. Leffler (hereinafter Trooper Leffler) was also on patrol as a State Trooper on Interstate 65, heading in a northerly direction at a location north of Trooper Richey. In the course of his duties Trooper Leffler observed a Chevrolet Nova automobile proceeding southbound on Interstate 65, at what appeared to be an excessive rate of speed and equipped with a rear bumper in

violation of the statute regulating bumper heights (IC 1971, 9-8-6-37.5). Because of traffic conditions Trooper Leffler deemed it inadvisable to move from the northbound lanes to the southbound lanes of Interstate 65 in order to pursue the Nova. Knowing that Trooper Richey was on patrol to the south, Trooper Leffler radioed Trooper Richey and advised him of the situation. Trooper Richey then took up a position at the Uniontown exit on Interstate 65 so that he could observe the Nova as it passed.

"3. A short time later, the Nova came into Trooper Richey's view and although at this time it was not being operated at an excessive rate of speed, the bumper height appeared to be excessive. As soon as traffic permitted, Trooper Richey drove on to Interstate 65 and proceeded to follow the Nova and thereafter decided to stop it for investigation of the rear bumper height.

"4. When Trooper Richey was finally able to position his vehicle beind (sic) the Nova, the driver, later identified as John J. Bunce, suddenly pulled around the vehicle in front of him. Immediately he cut back in front of the passed vehicle and maintained a position just a short distance ahead of the passed vehicle. Trooper Richey attempted to follow the Nova, but because of the position of the Nova in relation to

the vehicle behind it, he was unable to get his police vehicle in behind the Nova to stop it with the minimum disruption of the traffic flow. After the lapse of some time Trooper Richey was able to get the attention of the driver of the car immediately behind the Nova. This driver reduced his speed permitting Trooper Richey to position his vehicle behind the Nova. He then signalled John Bunce to pull off the driving lane.

"5. Trooper Richey stopped his vehicle a short distance behing (sic) the Nova and as he did so he observed what appeared to be bullet holes in the trunk lid. He also noticed that Mr. Bunce seemed to be fumbling with something down on the left side of the front seat. He proceeded cautiously to the left front door of the Nova positioning himself so that he could observe both southbound traffic and the movements of Mr. Bunce. When Mr. Bunce was unable to produce either a driver's license or vehicle registration, Trooper Richey requested him to come back to the police car where an identification check could be made. Bunce started to open the door in apparent compliance with Trooper Richey's request, but instead of getting out of the car, Bunce quickly accelerated and drove off at a high rate of speed bumping and knocking Richey backward.

"6. Trooper Richey rushed to his car which at the time was

located approximately 1-1/4 to 1-1/2 miles north of the Crothersville exit. As soon as traffic permitted and after activating a flashing red light located atop the police car and the siren, Trooper Richey commenced pursuit. He observed Bunce cut in front of traffic, nearly causing an accident, and then leave Interstate 65 at the Crothersville southbound exit which lead to U. S. 31. As he drove down the ramp, Bunce forced another car off the road. Bunce then disregarded the stop sign at the end of the exit ramp, slid on the U.S. 31, and drove south toward Austin, Indiana.

"7. Trooper Richey advised the Seymour State Police Post that he was still in pursuit. In addition to the siren and flashing red light, he turned on the fourway flashers and head lights. As the two vehicles proceeded south on U. S. 31, they were both traveling at speeds in excess of 100 miles per hour. The distance between the two cars remained about 1/4 of a mile. Trooper Richey observed several vehicles proceeding southbound on U. S. 31 near the northern limits of Austin, and he saw at least two cars leave the road as Bunce passd them.

"8. U.S. 31, as it approaches Austin, is upgrade for southbound traffic and then runs downgrade toward the junction of U.S. 31 and State Road 56. Trooper Richey felt it important that he reach the

crest of the road before Bunce reached this intersectsion so that he could observe which road Bunce took. However, Trooper Richey was aware of the potential danger to traffic. He, therefore, reduced his speed to below 100 miles per hour as he approached the traffic ahead, believing that at the reduced speed he could still make the necessary observation.

"9. There were, in fact, three vehicles proceeding south on U.S. 31 at the time Bunce approached Austin. First in line was a Mustang operated by Timothy Clyde O'Sullivan. Second in line was a vehicle operated by David Mains, and third in line was a vehicle operated by Larry Walker. David Mains observed the Nova pass the Walker vehicle. Realizing its excessive speed, he pulled his vehicle off to the right. After Bunce passed the Mains' vehicle, he moved the Nova farther to the left and passed the O'Sullivan vehicle which had not pulled off the road. As soon as the Nova passed him, Mr. Mains pulled his car back on the road. Almost immediately he heard a siren and shortly thereafter observed a police car approaching him from the rear with a flashing red light operating. Both Mr. Mains and Mr. Walker yielded to the police car by pulling off the road. The O'Sullivan vehicle continued to proceed south in the driving lane. Trooper Richey moved into the northbound lane to pass the O'Sullivan car. However,

shortly before reaching the intersection of U.S. 31 and Wilbur Avenue, Timothy O'Sullivan turned to the left in front of Trooper Richey and the collision occurred.

"10. Subsequent to the collision, John Bunce was apprehended in Scottsburg. An examination of the Nova confirmed that the rear of the vehicle was riddled with bullet holes which appeared to be 38 caliber.

"11. That on November 28, 1974, Section 3 of the Indiana Tort Claims Act, 34-4-16.5-3, provided in part as follows:

> 'Section 3. A governmental entity or an employee is not liable if a loss results from:
>
> '(7) The enforcement of, or failure to enforce, a law.'

"12. That the loss for which claim is made herein resulted from the enforcement of a law by Sargent L. Richey, an Indiana State Trooper employed by the defendant, State of Indiana.

"13. That the State of Indiana is immune from civil liability for the losses suffered by the Plaintiffs herein.

"14. That there is no genuine issue as to any material fact, and the defendant is entitled to a judgment as a matter of law.

> "IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the court that the defendant's motion for summary judgment be, and the same hereby is, granted, and,
>
> "It is further considered, ordered and adjudged by the Court that plaintiffs recover nothing by their complaint herein."
> 384 N.E. 2d at 1179-81.

Given these facts, the issue before us is whether Trooper Richey was engaged in the "enforcement of a law." If so, the Indiana Tort Claims Act immunizes the defendant from liability.

Plaintiffs contend that the term "enforcement of a law" is ambiguous and that therefore we should resort to rules of statutory construction. We do not accept that contention, for in our view, an officer engaged in effecting an arrest is in fact enforcing a law. And, in cases where a statute is clear and unambiguous, we have no choice but to hold it to its plain meaning. E.g.,

Lindley v. State, (1978) 268 Ind. 83, 373 N.E. 2d 886; Ott v. Johnson, (1974) 262 Ind. 548, 319 N.E. 2d 622; Cheney v. State ex rel. Risk, (1905) 165 Ind. 121, 74 N.F. 892. Moreover, even if we were to accept Plaintiffs' contention, we perceive the Legislature's amendment of Ind. Code Sec. 34-4-16.5-3(7)[2/] as having a clarifying effect on the statute insofar as all acts of enforcement save false arrest and imprisonment now render the State immune. In cases of ambiguity, we may resort to subsequent amendments in order to glean the Legislature's initial intent. See, e.g., Wilson v. State, (1978) Ind., 383 N.E. 2d 304; Hilligoss v. LaDow, (1977) Ind. App., 368 N.E. 2d 1365, appeal dismissed, (1978) 436 U.S. 942, 98 S. Ct. 2840, 56 L. Ed. 2d 783.

We agree with the trial court that

2/ See note 1 supra.

Trooper Richey was engaged in the enforcement of a law, at the time the accident occurred. The immunizing section of the Tort Claims Act is therefore applicable. Accordingly, the decision and opinion of the Court of Appeals are ordered vacated, and the judgment of the trial court is affirmed.

GIVAN, C.J. and PIVARNIK, J., concur;
DeBRULER, J., dissents with opinion in which Hunter, J. concurs;
HUNTER, J., dissents with opinion in which DeBruler, J. concurs.

IN THE

SUPREME COURT OF INDIANA

THE SEYMOUR NATIONAL BANK, As Guardian for TIMOTHY CLYDE O'SULLIVAN, THE SEYMOUR NATIONAL BANK, As Special Administrator of the Fstate of DEBORAH O'SULLIVAN, and JOHN L. O'SULLIVAN,
Appellants,

v.

STATE OF INDIANA,
Appellee.

NO. 781 S 185

(ENTERED JULY 10, 1981)
ON PETITION TO TRANSFER

DeBRULER, J. - Dissenting

Operators of motor vehicles upon the public streets and highways, whether in the employ of another or not, owe a private legal duty to others using the streets, to use due care while driving. This duty is imposed upon governors, judges, legislators, public employees and private employees and citizens, alike,

when taking the wheel. That the general Assembly should grant to any person a legal immunity from liability when operating a motor vehicle upon a public street, is an astounding proposition, as it is totally at odds with the pervasive regulation of that actvity by the State.

The state police officer, in this case, in taking up pursuit of a suspect in his patrol car, carried two legal duties, one private and one public. As pointed out by Judge Robertson, in his discerning opinion for the First District Court of Appeals, the driver of an emergency vehicle, while permitted to operate it beyond the limits set for ordinary driving, nevertheless has a statutorily imposed duty towards private individuals to drive it during emergency runs with due regard for the safety of all persons. Ind. Code Sec. 9-4-1-25. The officer in pursuing the suspect and

attempting to arrest him was also acting in furtherance of a duty owed solely to the public, i.e., the duty to enforce the criminal laws. See, Simpson's Food Fair, Inc. v. City of Evansville, (1971) 149 Ind. App. 387, 272 N.E.2d 871. To give full rein under these circumstances to the one is to vitiate the other. Yet to permit that result is our unavoidable judicial duty.

In construing the statutory terminology "enforcement of a law" Judge Robertson drew upon the fundamental rules that statutes in derogation of the common law will receive a strict construction and statutes will not be construed in a manner resulting in harsh or unjust consequences. To these I would add another which is that where two statutes are in apparent conflict they should be construed if it can be reasonably done, in a manner so as to bring them into

harmony. Wayne Twp. v. Brown, (1933) 205 Ind. 437, 186 N.E. 841; Thompson v. Thompson, (1972) 259 Ind. 266, 286 N.E.2d 657. Here, the immunity statute is in derogation of the common law and at odds with the statutory command that emergency vehicles be operated with due care. At common law this state police officer would be required to respond in damages for injuries resulting from his negligent operation of the patrol car. To grant an immunity which would shield negligent and reckless conduct obviously leaves injured victims to suffer without any remedy. Were we to construe the vague immunity provision as being applicable only in circumstances in which the public employee's conduct involved a public duty only, impediment of the common law would be lessened, unjust consequences would be reduced in number, and the two statutes would be left viable and in harmony.

This is the legal course charted by Judge Robertson, and I am convinced it is the correct one. I would therefore reverse and remand for trial as did the Court of Appeals.

Hunter, J., concurs, with separate opinion.

IN THE

SUPREME COURT OF INDIANA

THE SEYMOUR NATIONAL BANK,
as Guardian for Timothy Clyde O'Sullivan,
THE SEYMOUR NATIONAL BANK,
as Special Administrator of the Estate
of Deborah O'Sullivan,
JOHN L. O'SULLIVAN,
Appellants (Plaintiffs below),

v.

STATE OF INDIANA,
Appellee (Defendant below).

Supreme Court
No. 781 S 185

Court of Appeals
No. 1-578 A 125

(ENTERED JULY 10, 1981)
ON PETITION TO TRANSFER
APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
THE HONORABLE WILLIAM M. LIENBERGER, JUDGE

HUNTER, J. -- Dissenting.

I must respectfully dissent from the majority opinion; I am unable to accept the proposition that the legislature intended the literal reading and application of Ind. Code Sec.

34-4-16.5-3(7) (Burns 1980 Supp.) which the majority attributes to it here. The implications of the conclusion that our governmental entities enjoy absolute immunity in the "enforcement" of any law are very unsettling. We have, it appears, returned full circle to the anachronistic notion that "the King can do no wrong," for the majority's literal application of the statute means citizens have no recourse in law for a loss sustained at the hands of a governmental employee "enforcing" a law, even where the conduct may be malicious, grossly negligent, or in willful and wanton disregard for public safety or property.

Without question governmental entities must be accorded a certain immunity for the acts of its employees in the enforcement of laws. The circumstances which attend the need for law enforcement often times demand

immediate and aggressive action to insure the public welfare; because the acts accompanying the enforcement sometimes occur in public thoroughfares and places, unfortunately yet inevitably damage to private property or injury to innocent bystanders occasionally results.

Police officers, of course, are the governmental employees who confront such a situation on a regular basis. For that reason, our legislature has authorized programs for the law enforcement officers of this state, which expressly includes instruction in safety and the pursuit and apprehension of suspected criminals. Ind. Code Sec. 10-1-3-1 et seq. (Burns 1981 Repl.); Ind. Code Sec. 17-3-9-1 (Burns 1974).

Likewise, to minimize the risk of injury to innocent bystanders or private property, the state police, pursuant to the legislative powers delegated that

body by the General Assembly, has adopted departmental rules and regulations to govern the conduct of its officers. Administrative Rules and Regs. Sec. (10-1-1-4)-11 (Burns 1976). Therein, the following acts are prohibited and warrant disciplinary action:

> "7. Wilful (sic) or grossly negligent loss or destruction of state property or the property of another, except where destruction is properly authorized.
>
> "8. Capricious or grossly negligent endangerment of the life and limb of another person.
>
> "9. Conversion of the property of another public property or contraband, to private or unauthorized use without proper authority.
>
> "10. Wilful (sic) or negligent disregard of the property rights of another through the exercise of police authority." Id. (emphasis added).

The prohibition against gross negligence and wanton or malicious misconduct, as well as the police training program, is designed to protect

life and property from needless harm or destruction at the hands of irresponsible conduct. It is incongruous that the legislature, in the face of these rules and the reasons therefor, would enact a statute by which the victim of such reprehensible conduct would be barred from obtaining redress from the offending governmental entity in our courts of law. And the conclusion that an injured citizen must endure the economic consequences without recompense is offensive when measured against the disability, death, and survivor benefits which, by statute, would be available to an officer injured or killed in the same incident. Ind. Code Sec. 10-1-2-1 et seq. (Burns 1981 Repl.); Ind. Code Sec. 19-1-24-1 et seq. (Burns 1974).

Can it reasonably be said that our legislature intended to grant absolute immunity to the governmental entity whose

employee-officer, in pursuit of a shoplifter, might drive his automobile through a crowded playground at high speeds, thereby injuring children? It is an extreme example in fact, yet the literal application of the immunity provision is an extreme rule in law which will engender extraordinarily harsh results.

It should also be noted that the "enforcement" of laws is not the exclusive bailiwick of police officers. By express statutory provisions, assorted governmental officials are vested with the power to enforce specific laws. See, e.g. Ind. Code Sec. 14-3-4-1 et seq. (Burns) 1981 Repl.) (law enforcement division of Department of Natural Resources created to "enforce" conservation laws); Ind. Code Sec. 16-1-4-2 (Burns 1973) (local health officers granted power to "enforce"

health laws, ordinances, orders, and rules and regulations); Ind. Code Sec. 22-8-1.1-35.6 (Burns 1974) (commissioner of Occupational Health and Safety Board has power to "enforce" a safety order, penalty assessment, or notice of failure to correct violation); Ind. Code Sec. 22-2-9-4 (Burns 1974 (commissioner of Labor Division has duty to "enforce" wage claim laws); Ind. Code Sec. 22-11-5-6 (Burns 1974) (state fire marshal has power to "enforce" all laws of state and cities regarding fires, explosives, combustibles, fire alarms and extinguishing equipment, and the investigation, prosecution, and suppression of arson).

From these few statutes it can readily be seen that the legislature has employed the term "enforcement" in a wide range of government-controlled activities which, depending upon the particular

statutory context, gives rise to various connotations and interpretations of the word "enforcement." Furthermore, the legislature, in numerous other statutes, has refrained from use of the word "enforcement" but has granted powers which are designed to serve the purpose of law enforcement. See, e.g. Ind. Code Sec. 22-8-1.1-23.1 (Burns 1974) (commissioner of Occupational Health and Safety Board or his representative has power to enter and inspect premises of employer for suspected violations); Ind. Code Sec. 14-2-3-2 (Burns 1981 Repl.) (director of Division of Fish and Wildlife or his representative may enter into private property for the purpose of killing, removing, managing, or protecting a wild animal); Ind. Code Sec. 14-2-9-1 (Burns 1981 Repl.) (director of Fish and Wildlife Division, game wardens and deputy game wardens have

power to search boats, vehicles or any receptacle in which game could be found to secure evidence of a violation of fish and game laws).

I point out the existence of these latter enactments because in each the legislature has prescribed conduct which is in the nature of a search and seizure. Under the literal interpretive sense employed by the majority, a search and seizure conducted prior to a determination that a law has in fact been violated cannot be described as the "enforcement" of a law. Rather, it is a preliminary act from which enforcement may or may not follow; all such searches and seizures by officers of the state consequently fall outside the immunity statute under the interpretation proffered by the majority.

In short, behind the Court's opinion here today waits a Pandora's box of

unsettling questions which will revolve around dubious distinctions between the "administration" and "enforcement" of laws. The source of that inevitable consternation is the fact that the term "enforcement" in Ind. Code Sec. 34-4-16.5-3(7), supra, is ambiguous both in and of itself and in relation to the various statutes with which it must be construed and reconciled.

For these reasons, I, like Justice DeBruler, am persuaded by the statutory analysis ably outlined by Judge Robertson for the unanimous Court of Appeals. Seymour Nat. Bank v. State, (1979) ___ Ind. App. ___, 384 N.E. 2d 1177. I share the opinion that the legislature embraced and enacted the common law of this state as it existed at the time Ind. Code Sec. 34-4-16.5-3, supra, was passed. See Campbell v. State, (1972) 259 Ind. 55, 284 N.E. 2d 733; Board of Commissioners

of Delaware County v. Briggs, (1975) 167 Ind. App. 96, 337 N.E. 2d 852; Simpson's Food Fair, Inc. v. City of Evansville, (1971) 149 Ind. App. 387, 272 N.E. 2d 871.

Here, the plaintiff should have been permitted to present his claim to the jury. Were that the case, I agree with Judge Robertson that it would be imperative to a proper factual resolution that the jury be exposed to standards of police practice relative to the circumstances at issue. To that end, it would be appropriate to instruct the jury regarding the various rules of conduct enunciated in Administrative Rules and Regs. Sec. (10-1-1-4)-11, supra, as well as the operative factors detailed by Judge Robertson:

> "[S]uch circumstances might include among others, the probability of harm to third persons and the gravity of an injury that would result therefrom, the availability of assistance by other police units, and the severity of the criminal conduct

of the suspected felon [criminal]." Seymour Nat. Bank v. State, supra at 1187.

I would clarify "the probabiity of harm to third persons" to indicate that "the harm" refers to injury which might flow from the hand of the criminal suspect as well as that of the law enforcement officer.

Unfortunately, however, there will be no opportunity for these guidelines to be implemented. Even more unfortunate are the ramifications of the rationale upon which the plaintiffs' action is barred. I dissent in both respects. The cause should be remanded for a trial on the merits.

DeBRULER, J., CONCURS IN SEPARATE OPINION.

(ENTERED MARCH 26, 1979)

IN THE

COURT OF APPEALS OF INDIANA

No. 1-578 A 125

The Seymour National Bank et al
V. State of Indiana

You are hereby notified that the Court of Appeals has on this day Appellee Petition for Rehearing DENIED. Buchanan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 26th day of Mar., 1979.

/S/ Marjorie H. O'Laughlin
Clerk, Court of Appeals

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

THE SEYMOUR NATIONAL BANK
as Guardian for Timothy Clyde O'Sullivan,
THE SEYMOUR NATIONAL BANK,
as Special Administrator of the Estate
of Deborah O'Sullivan,
JOHN L. O'SULLIVAN,
Plaintiffs-Appellants,

v.

STATE OF INDIANA,
Defendant-Appellee.

NO. 1-578-A-125

(ENTERED JANUARY 31, 1979)

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable William M. Lienberger, Judge

ROBERTSON, J.

Plaintiffs-appellants Seymour National Bank, as guardian for Timothy Clyde O'Sullivan and as special administrator of the Estate of Deborah O'Sullivan (collectively referred to as O'Sullivan) appeal from a grant of

summary judgment in favor of defendant-appellee State of Indiana (State).

We reverse.

O'Sullivan sought recovery against the State for injuries allegedly due to the negligence and/or willful and wanton misconduct of an Indiana State Trooper while in the performance of acts within the scope of his employment.[1/] Since issues of fact are not pursued by the parties, the posture of this case is reflected by the judgment of the trial court:

> This cause having been submitted to the Court on the motion for summary judgment filed

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1/ O'Sullivan also sought to hold the State liable for the negligent training of State Troopers. Having found reversible error on other grounds, we decline to resolve whether he may recover on that theory. With respect to that theory, however, see Thomas v. Johnson, 295 F. Supp. 1025 (D.C.D.C. 1968); Snell v. Murray, 117 N.J. Super. 268, 284 A.2d 381 (1971).

by the defendant, the State of Indiana, and upon pleadings, interrogatories and answers thereto, and affidavits in support of said motion for summary judgment, and the Court, having heard oral arguments thereon and having considered briefs filed by the parties herein, now finds:

1. On November 28, 1974, Sargent L. Richey (hereinafter Trooper Richey) was employed by the State of Indiana as a State Trooper for the Indiana State Police. Sometime after 11:00 A.M. on said date in the course and scope of his employment, Trooper Richey was on patrol in Jackson County, Indiana near the Uniontown exit of Interstate Highway 65.

2. At about the same time, C. W. Leffler (hereinafter Trooper Leffler) was also on patrol as a State Trooper on Interstate 65, heading in a northerly direction at a location north of Trooper Richey. In the course of his duties Trooper Leffler observed a Chevrolet Nova automobile proceeding southbound on Interstate 65, at what appeared to be an excessive rate of speed and equipped with a rear bumper in violation of the statute regulating bumper heights (IC 1971, 9-8-6-37.5). Because of traffic conditions Trooper Leffler deemed it inadvisible to move from the northbound lanes to the southbound lanes of Interstate 65 in order to pursue the Nova. Knowing that Trooper Richey was on patrol to the south, Trooper Leffler radioed Trooper Richey and advised him of

the situation. Trooper Richey then took up a position at the Uniontown exit on Interstate 65 so that he could observe the Nova as it passed.

3. A short time later, the Nova came into Trooper Richey's view and although at this time it was not being operated at an excessive rate of speed, the bumper height appeared to be excessive. As soon as traffic permitted, Trooper Richey drove on to Interstate 65 and proceeded to follow the Nova and thereafter decided to stop it for investigation of the rear bumper height.

4. When Trooper Richey was finally able to position his vehicle beind (sic) the Nova, the driver, later identified as John J. Bunce, suddenly pulled around the vehicle in front of him. Immediately he cut back in front of the passed vehicle and maintained a position just a short distance ahead of the passed vehicle. Trooper Richey attempted to follow the Nova, but because of the position of the Nova in relation to the vehicle behind it, he was unable to get his police vehicle in behind the Nova to stop it with the minimum disruption of the traffic flow. After the lapse of some time Trooper Richey was able to get the attention of the driver of the car immediately behind the Nova. This driver reduced his speed permitting Trooper Richey to position his vehicle behind the Nova. He then signalled John Bunce to pull off the driving lane.

5. Trooper Richey stopped his vehicle a short distance behing (sic) the Nova and as he did so he observed what appeared to be bullet holes in the trunk lid. He also noticed that Mr. Bunce seemed to be fumbling with something down on the left side of the front seat. He proceeded cautiously to the left front door of the Nova positioning himself so that he could observe both southbound traffic and the movements of Mr. Bunce. When Mr. Bunce was unable to produce either a driver's license or vehicle registration, Trooper Richey requested him to come back to the police car where an identification check could be made. Bunce started to open the door in apparent compliance with Trooper Richey's request, but instead of getting out of the car, Bunce quickly accelerated and drove off at a high rate of speed bumping and knocking Richey backward.

6. Trooper Richey rushed to his car which at the time was located approximately 1-1/4 to 1-1/2 miles north of the Crothersville exit. As soon as traffic permitted and after activating a flashing red light located atop the police car and the siren, Trooper Richey commenced pursuit. He observed Bunce cut in front of traffic, nearly causing an accident, and then leave Interstate 65 at the Crothersville southbound exit which lead to U.S. 31. As he drove down the ramp, Bunce forced another car off the road. Bunce then disregarded the stop sign at

the end of the exit ramp, slid on the U.S. 31, and drove south toward Austin, Indiana.

7. Trooper Richey advised the Seymour State Police Post that he was still in pursuit. In addition to the siren and flashing red light, he turned on the four-way flashers and head lights. As the two vehicles proceeded south on U.S. 31, they were both traveling at speeds in excess of 100 miles per hour. The distance between the two cars remained about 1/4 of a mile. Trooper Richey observed several vehicles proceeding southbound on U.S. 31 near the northern limits of Austin, and he saw at least two cars leave the road as Bunce passed them.

8. U.S. 31, as it approaches Austin, is upgrade for southbound traffic and then runs downgrade toward the junction of U.S. 31 and State Road 56. Trooper Richey felt is (sic) important that he reach the crest of the road before Bunce reached this intersection so that he could observe which road Bunce took. However, Trooper Richey was aware of the potential danger to traffic. He, therefore, reduced his speed to below 100 miles per hour as he approached the traffic ahead, believing that at the reduced speed he could still make the necessary observation.

9. There were, in fact, three vehicles proceeding south on U.S. 31 at the time Bunce approached Austin. First in line was a Mustang operated by Timothy Clyde O'Sullivan. Second in line was a

vehicle operated by David Mains, and third in line was a vehicle operated by Larry Walker. David Mains observed the Nova pass the Walker vehicle. Realizing its excessive speed, he pulled his vehicle off to the right. After Bunce passed the Mains' vehicle, he moved the Nova farther to the left and passed the O'Sullivan vehicle which had not pulled off the road. As soon as the Nova passed him, Mr. Mains pulled his car back on to the road. Almost immediately he heard a siren and shortly thereafter observed a police car approaching him from the rear with a flashing red light operating. Both Mr. Mains and Mr. Walker yielded to the police car by pulling off the road. The O'Sullivan vehicle continued to proceed south in the driving lane. Trooper Richey moved into the northbound lane to pass the O'Sullivan car. However, shortly before reaching the intersection of U.S. 31 and Wilbur Avenue, Timothy O'Sullivan turned to the left in front of Trooper Richey and the collision occurred.

10. Subsequent to the collision, John Bunce was apprehended in Scottsburg. An examination of the Nova confirmed that the rear of the vehicle was riddled wilth bullet holes which appeared to be 38 caliber.

11. That on November 28, 1974, Section 3 of the Indiana Tort Claims Act, 34-4-16.5-3, provided in part as follows:

"Section 3. A governmental entity or an employee is not liable if a loss results from:

* * *

(7) The enforcement of, or failure to enforce, a law."

12. That the loss for which claim is made herein resulted from the enforcement of a law by Sargent L. Richey, an Indiana State Trooper employed by the defendant, State of Indiana.

13. That the State of Indiana is immune from civil liability for the losses suffered by the plaintiffs herein.

14. That there is no genuine issue as to any material fact, and the defendant is entitled to a judgment as a matter of law.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant's motion for summary judgment be, and the same hereby is, granted, and,

It is further considered, ordered and adjudged by the Court that plaintiffs recover nothing by their complaint herein.

Because the foregoing discloses a myriad of fact questions, it is clear that the trial court's conclusion was rooted in

the doctrine of sovereign immunity as it remains in IND. CODE 34-4-16.5-3.

We believe the proper resolution of this case requires a brief excursus into the common law of this state prior to the effective date of IC 34-4-16.5-3. As a predicate, it is important to keep in mind that governmental immunity and sovereign immunity are not interchangeable terms. Sovereign immunity is only applicable to the state, while governmental immunity applies to all units of government.

Our courts were generally more willing to erode the harshness of governmental immunity at the local level because it could be accomplished without diluting the scope of sovereign immunity. This task was achieved by characterizing municipal corporations as acting in a dual capacity. When it acted as an arm of the sovereign in performing

functions on behalf of the state, it was protected in a derivative manner by the doctrine of sovereign immunity. Conversely, when it acted in its individual capacity, i.e., as a corporate entity, it could be held liable as any other private corporation:

> In order that the state may perform its function, it is necessary for it to be represented by agencies of government and, where these agencies merely perform such governmental functions, holding them responsible for negligence would be manifestly the same as holding the sovereign power answerable. On the other hand, a state agency, as a corporation, acquires an individuality distinct from the sovereign power, and the principle stated does not prevent the corporate body from being held liable for its own negligence, no more than it would exempt a public state officer from liability for his negligence in the management of his personal or private affairs.

City of Kokomo v. Loy, (1916) 185 Ind. 18, 21, 112 N.E. 994, 995. The touchstone of analysis in Loy focused upon the capacity in which the municipal

corporation was acting. The individual capacity of a municipal corporation was most obvious when it engaged in functions akin to that of a business, and hence the distinction between proprietary and governmental acts was widely employed. See,e.g., Flowers v. Board of Commissioners of the County of Vanderburgh, et al., (1960) 240 Ind. 668, 168 N.E.2d 224; City of Logansport v. Public Service Commission of Indiana, et al., (1931) 202 Ind. 523, 177 N.E. 249.

The second area to attract the sympathies of the courts involved government officers clothed with governmental immunity. Again, it was possible to mitigate the harshness of immunity without affecting the liability of the state, as well as the derivative immunity of local governmental units. In this vein, our Supreme Court in Wallace, et al. v. Feehan, (1934) 206 Ind. 552,

190 N.E. 438, declared that an officer enjoys only a conditional privilege when performing a ministerial, as opposed to a discretionary, function. Thus, when vested with the authority to make a decision, the exercise of discretion incidental thereto was protected by governmental immunity. After the decision and manner of implementation had been made, however, the cloak of immunity was removed and he could be held personally liable for negligence in the performance of the act. See also Adams v. Schneider, et al, (1919) 71 Ind.App. 249, 124 N.E. 718. At this juncture, therefore, sovereign immunity remained inviolate. Public officers, however, could be held personally liable in the negligent performance of ministerial acts, and municipal corporations were unprotected when acting in a corporate or proprietary capacity.

As pertinent to the issues in the case at bar, Stine v. Shuttle, et al., (1962) 134 Ind.App. 67, 186 N.E.2d 168, involved the sustaining of a demurrer to a complaint alleging negligence on the part of the City of Evansville, two Evansville policemen, and an Evansville city clerk. In that case, the clerk erroneously issued a warrant for the arrest of the plaintiff which was executed by the police officers. On appeal, this court reversed only as to the city clerk because the clerk was engaged in a ministerial act and, as such, could be held personally liable for negligence in the performance of that duty. This liability, however, would not attach to the city unless a proprietary function was being performed. In holding that the demurrer was properly sustained as to the city, the appellate court declared:

> (I)t is well settled that (a municipal corporation) is not liable for the acts of its officers in attempting to enforce police regulations, as such regulations are not made or enforced in the interest of the local corporation in its private capacity but in the interests of the public. See Mayne v. Curtis, Rec. (1920), (T.D.), 73 Ind.App. 640, 647, 126 N.E. 699.

134 Ind.App. at 76-77, 186 N.E.2d at 173. Therefore, since the function was governmental and not proprietary, the municipal corporation could not be held liable. As stated in Loy, the rationale for excusing liability was found in Mayne v. Curtis, supra, relied upon in Stine:

> A municipal corporation possesses two kinds of powers--one governmental and public and, to the extent they are held and exercise, is clothed with sovereignty; the other private and, to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter it is a corporate legal individual. 6 McQuillin, Mun. Corp. Sec. 2625. (Emphasis added).

73 Ind.App. at 646, 126 N.E. at 701.

Municipal corporation immunity based on the sovereign character of certain functions became a dead letter in the landmark decision of Brinkman v. City of Indianapolis, et al., (1967) 141 Ind.App. 662, 231 N.E.2d 169. In Brinkman, a police officer responded to a call to transport Brinkman to the hospital. When he arrived, the officer was informed of Brinkman's severe illness. While in transit to the hospital, however, the officer arrested Brinkman for drunkenness and disorderly conduct. He was thereafter committed to jail without medical attention and subsequently died in his cell. An autopsy revealed a total absence of alcohol. A wrongful death action was instituted by the administratrix of Brinkman's estate. The complaint alleged, inter alia, that the police

officer breached a duty to the decedent, and that the City was liable therefore. The trial court sustained the demurrer to the complaint.

On appeal, both parties relied on the governmental/proprietary distinction in support of their respective positions. In light of the "inherent inequities found in the governmental-proprietary distinction," however, the Appellate Court en banc laid to rest the "legalistic distinction," and opted to impose liability on the basis of respondeat superior. Furthermore, the Brinkman court declared that the relationship of respondeat superior was present as between the officer and the city. Therefore, the demurrer was erroneously sustained.

Klepinger v. Board of Commissioners of the County of Miami, etc., (1968) 143 Ind.App. 178, 239 N.E.2d 160, overruled

on other grounds 259 Ind. 55, 284 N.E.2d 733, illustrated the extension of Brinkman to civil cities and counties. In Klepinger, suit was brought against the county for negligence in the repair of a bridge. This court specifically held that the reparation of the bridge was a ministerial act and a proprietary function. Nevertheless, we proceeded to apply the reasoning and result of Brinkman, and declared that the doctrine of governmental immunity was abrogated as to cities and counties, and that liability would lie where the relationship of respondeat superior was found to be present. We took occasion to quote at length and adopt the Kentucky Court of Appeals decision of Haney v. City of Lexington, et al., 386 S.W.2d 738 (Ct. App. 1964). The Haney court reviewed the pervasive critical attacks upon the doctrine of governmental

immunity by legal scholars and courts of other jurisdictions. Relying thereon, the court recognized that the doctrine was "an anachronism" and existed "only by the force of inertia."[2/] Further, that the doctrine was unfair in "denying a remedy for a wrong," which "results in the deprivation of life, liberty, and property without due process of law; and that (it) runs counter to a basic concept underlying the law of torts, that is, that liability follows negligence.[3/]

The logical progression in the elimination of governmental immunity culminated in the abrogation of sovereign immunity in Campbell, et al. v. State, (1972) 259 Ind. 55, 284 N.E.2d 733. The Campbell court found persuasive the

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2/ Quoting from Muskopf et al. v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457, 460.

3/ Quoting from 41 N.C.L. Rev. 290, 291 (1963).

Appellate Court arguments in Brinkman and Klepinger and, therefore, applied the same rule to state liability in tort. Our Supreme Court recognized that the harshness of governmental immunity had no place in a modern system of equitable distribution of losses:

> We may also add that the elimination of sovereign immunity means a more equitable distribution of losses in society caused by the government unto members of society, rather than forcing individuals to face the total loss of the injury.

259 Ind. at 61, 284 N.E.2d at 736. In conclusion, the court held that the state may be held liable to the same extent as a municipal corporation or a county of the state. The court opined that the plaintiff must be able to establish a breach of a private duty owed to him. If such a showing is made, sovereign immunity will not shield the state from responsibility so long as the relationship of respondeat superior is present.

Nevertheless, the proper application of the "private duty" test proclaimed in Campbell was ambiguous. Clarification was squarely undertaken by Judge Lowdermilk in Board of Commissioners of Delaware County v. Briggs, (1975) Ind.App., 337 N.E.2d 852. The Briggs formulation noted that Campbell and subsequent decisions had established a two-pronged analysis. In the broad sense, since liability was predicated on the basis of respondeat superior, if the governmental officer was personally immune, then the state could likewise enjoy the sanction of immunity. As such, the earlier decisions holding an officer personally liable were revitalized and the discretionary/ ministerial distinction was reborn. Thus, if the plaintiff could establish that the officer was engaged in a ministerial function, the plaintiff would

be entitled to recover on the basis of respondeat superior since the officer was not protected by immunity.

The second prong of analysis, concerning the "private duty" test in Campbell, established that a discretionary act would generally confer immunity; however, if the plaintiff could show the existence of a private duty, the officer would not be immune from liability even if he was engaged in a discretionary act. Therefore, a cause of action would be stated if the plaintiff could show that:

(1) the officer was acting in a ministerial capacity; or

(2) the officer owed a private duty to the plaintiff to exercise due care.

Conversely, if the officer was engaged in a duty owed only to the public, then the exercise of discretion therein would support the defense of immunity.

A pertinent example of the vestigial remains of governmental immunity after Campbell is found in Simpson's Food Fair, Inc. v. City of Evansville, (1971) 149 Ind.App. 387, 272 N.E.2d 871. Suit was brought in negligence against the City on the basis that the failure to halt a crime wave resulted in the insolvency of plaintiff's business. This court held that no private duty existed because municipalities do not owe an obligation to "guarantee" and "assure" the welfare of its citizens. In light of Campbell[4/] and Briggs, we believe Simpson stands for the proposition that the decision to enforce or not to enforce a law is a discretionary act in the performance of a duty owed solely to the public, and

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4/ The Campbell court expressly approved the application of immunity in Simpson.

therefore such decisions enjoy the cloak of immunity. This proposition is buttressed by the fact that Simpson did not rely on Stine or Mayne. Indeed, since the municipal corporation was held to be immune in Stine because the municipal corporation was not acting in its private or proprietary capacity, it was overruled by Brinkman and Briggs. Likewise, the precedential force of Mayne was eradicated by Brinkman since Mayne also was based on the governmental/ proprietary distinction.

With this background in mind, we proceed to discern whether, under the common law of this state, the State Trooper owed O'Sullivan a private duty or whether he was engaged in a ministerial act.[5/] With respect to the former, we

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5/ For illustrative cases relying on the discretionary/ministerial distinction, see Mobile Enterprises, Inc. v. Conrad, (1978) Ind.App., 380 N.E.2d

have held that drivers of emergency vehicles owe a duty of care to the life and property of others when driving over the maximum speed limit. Bailey, et al. v. L. W. Edison Charitable Foundation of Grand Rapids, Inc., et al., (1972) 152 Ind.App. 460, 284 N.F.2d 141. The duty recognized in Bailey arose from IC 9-4-1-25, which in relevant part provides:

> (d) The driver of an authorized emergency vehicle may:
>
> * * *
>
> 3. Exceed the maximum speed limits so long as he does not endanger life or property * * *

5/ (Continued)

100; Department of Commerce v. Glick, (1978) Ind.App., 372 N.E.2d 479; Salem Bank and Trust Co. v. Whitcomb, (1977) Ind.App., 362 N.E.2d 1180; Briggs, supra. See also Scott County School District I v. Asher, (1974) 160 Ind.App. 299, 312 N.E.2d 131, aff'd 263 Ind. 47, 324 N.E.2d 496. For application of the private duty analysis, see Roberts v. State, et al., (1974) 159 Ind.App. 456, 307 N.E.2d 501.

> (f) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

The Bailey court recognized that the statute was intended to extend a "tempered privilege" to drivers of emergency vehicles. Thus, we think a stautorily imposed duty towards private individuals exists by virture of Bailey and IC 9-4-1-25. 6/

6/ Under a similar statute, the Supreme Court of Arizona upheld the liability of a police officer in Ruth et ux. v. Rhodes, 66 Ariz. 129, 185 P.2d 304 (1947). In Ruth, there was testimony to the effect that the police officer was exceeding the speed limit while responding to an emergency dispatch.

Moreover, we believe Trooper Richey, while in hot pursuit, was performing a ministerial act under the authority of Briggs, and the discretionary/ministerial test adopted therein from Adams v. Schneider, et al., supra:

> 'A duty is discretionary when it involves on the part of the officer to determine whether or not he should perform a certain act, and, if so, in what particular way, and

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6/ (Continued)

When the officer attempted to pass the plaintiff's truck, the plaintiff turned left, thinking he could "make it" without being struck by the police car. A jury verdict in favor of the plaintiff was affirmed upon the basis that the jury could have found the officer negligent in light of a statute similar to our IC 9-4-1-25. See also Eubanks v. Wood, et ux., 304 S.W.2d 567 (Tex. Civ.App. 1957)(police officer held negligent under analogous statute for driving at an excessive rate of speed); Goddard v. Williams, 251 N.C. 128, 110 S.E.2d 820 (1959), (deputy sheriff held liable for driving at an excessive rate of speed in a residential district); 60A C.J.S. Motor Vehicles Sec.375 (1969). See generally Morrison, Negligent Operation of a Police Vehicle, 16 Clev-Mar. L.R. (3), 442 (1967); 83 A.L.R.2d 383 (1962).

> in the absence of corrupt motives in the exercise of such discretion he is not liable. His duties, however, in the performance of the act, after he has once determined that is shall be done, are ministerial, and for negligence in such performance, which results in injury, he may be liable in damages. (71 Ind.App.) at 255, 124 N.E. at 720.'

337 N.E.2d at 863. As a preliminary matter, therefore, we believe O'Sullivan would have been entitled to bring an action under the common law of this state. Hence, we must now decide if IC 34-4-16.5-3 grants immunity under the facts at bar in derogation of the common law.

The State contends the legislature resurrected immunity under the facts presented herein by the enactment of IC 34-4-16.5-3, which provides, in pertinent part:

> IMMUNITY FROM LIABILITY.--A governmental entity or an employee is not liable if a loss results from:

* * *

(6) the performance of a discretionary function;

(7) the enforcement of or failure to enforce a law * * * 7/

With respect to sub-paragraph (6), we again agree with Judge Lowdermilk's observation in Briggs that the term "discretionary function" is identical to the remnants of immunity which attach when an officer exercises his discretion in the performance of a purely public duty. When the duty is not purely public but, rather, also involves a private

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7/ The act now reads:

IMMUNITY FROM LIABILITY. A governmental entity or an employee within the scope of his employment is not liable if a loss results from:

* * *

(7) the adoption and enforcement of or failure to adopt or enforce a law, including rules and regulations, unless the act of enforcement constitutes false arrest or false imprisonment * * *

duty, the fact that the officer was exercising discretion becomes irrelevant. Since we have concluded that a private duty was owed, sub-paragraph (6) is inapplicable.[8/]

Moreover, the crux of this dispute concerns the application of IC 34-4-16.5-3(7). With respect to the failure to enforce a law, we think it clear that the legislature intended to codify our result in Simpson, i.e., the failure to enforce a law is a discretionary act done in furtherance of a duty which is owed solely to the public.[9/] With respect to the immunity

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8/ Further, Dean Foust has suggested that IC 34-4-16.5-3, with a minor exception not applicable here, is merely a codification of the common law. See 8 Ind. L.Rev. 264, 274-276; Briggs, supra.

9/ We are unable to say that there will never be a situation where such a decision would be so flagrant so as to remain protected.

from losses resulting from the enforcement of the law, the legislative intent is not so easily discerned. Broadly speaking, "enforcement" might reasonably encompass: (1) the decision to enforce; (2) the decision to enforce in a particular manner; (3) the actual implementation of such a decision; and, (4) the result of enforcement, i.e., the result of the exercise of restraint or compulsion upon those persons who are the object of the decision to enforce the law.10/

The plain meaning of "enforcement,"

10/ The elasticity of the term permits it to be applicable, arguably, to every step in the law enforcement process. For example, brutality to incarcerated prisoners might be protected since the imprisonment is merely a stage in the process of enforcing the law. We narrow the number of possible meanings to those relevant to the facts at bar for the sake of clarity. We by no means intend to suggest "enforcement" has a finite number of meanings, or that those in the body of this opinion are the only meanings.

however, does not dictate the specific inclusion or exclusion of the above elements. Since the decision to enforce a law is parellel to the decision not to enforce a law, it is clear that in light of consistency and the holding in Simpson, the legislature intended immunity to attach. We also believe the legislature intended to shield an officer from civil liability based upon the result of enforcement as it affects the person or persons against whom the enforcement is directed.[11/] Therefore, it is clear that the legislature intended enforcement to mean at least that the decision to enforce and the end result

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11/ Although not controlling, we may look to subsequent amendments to an act in discerning legislative intent. Oster v. Department of Treasury, et al., (1941) 219 Ind. 313, 37 N.E.2d 528. The amendments, supra note 7, clearly disclose that the legislature was concerned with the end result of enforcement upon the object thereof.

thereof upon the object of the enforcement (within the bounds of law) is protected activity and will not give rise to a civil action for damages.

We are uncertain, however, whether the legislature intended the cloak of immunity to cover the activities in the second and third categories above. As such, we must resort to our interpretive powers to discern the intended operation of the statute. See Indiana State Highway Commission, et al. v. White, (1973) 259 Ind. 690, 291 N.E.2d 550.

First, to say that the legislature intended the state and its employees to be immune in the actual implementation of the decision to enforce a law would be to sanction and permit negligent and even reckless implementation of such a decision. We are reminded that it was instrumental in the erosion of governmental immunity that the doctrine

necessarily resulted in hardship to the individual. See Brinkman, supra; Campbell, supra. It is axiomatic that we will not construe a statute in a manner which results in harsh or unjust consequences. Reece v. Review Board of the Employment Security Division, (1977) Ind.App., 360 N.E.2d 1262, and cases cited therein. Therefore, we do not believe the legislature intended "enforcement" to shield negligent and reckless conduct in the carrying out of a decision to enforce the law.

Furthermore, it is also fundamental that statutes in derogation of the common law will be strictly construed; therefore, in case of doubt, we will favor a construction which is in harmony with the common law. Helms, et al. v. The American Security Company of Indiana, Inc., (1939) 216 Ind. 1, 22 N.E.2d 822. Under our review of the common law of

this state, it is clear that the decision to implement the enforcement of a law in a particular way is a discretionary act, while the performance thereof is ministerial. Briggs, supra. Thus, under the common law, an officer could be held liable for the ministerial act of carrying out a decision to enforce the law. Also, as just noted, the imposition of liability in such a case will avoid judicially recognized hardship to the individual. Hence, absent a clear showing of legislative intent to the contrary, "enforcement"[12/] does not

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12/ Compare the explicit legislative intent seen in these Kansas and Arkansas cases:

(K.S.A.) 46--901--

> (a) It is hereby declared and provided that the following shall be immune from liability and suit on an implied contract, or for negligence or any other tort, except as otherwise specifically provided by statute:

encompass the mechanical implementation of the decision to enforce a law.

With respect to the decision to enforce the law in a particular way, it is a discretionary function and will be exempt from liability so long as the plaintiff is unable to establish a

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12/ (Continued)

(1) The State of Kansas
* * *

Quoted from Brown, et al. v. Wichita State University, et al., 219 Kan. 2, 547 P.2d 1015, 1020 (1976). (Emphasis (sic) added).

> It is hereby declared to be the public policy of the State of Arkansas that all counties . . . and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees. (Emphasis added).

Quoted in Sullivan v. Pulaski County, 247 Ark. 259, 445 S.W.2d 94, 95 (1969).

private duty.[13/] See Briggs, supra. Therefore, we hold that IC 34-4-16.5-3(7) is in harmony with the common law, and hence the summary judgment in favor of the State was improvidently granted.

To facilitate the proceedings below on remand, we deem it advisable to discuss the appropriate standard of care owed by Trooper Richey to O'Sullivan. We do not believe that the mere fact that a defendant is a police officer requires a departure from traditional negligence principles. Thus, the standard to be employed is whether the defendant exercised his duty with the level of care that an ordinary prudent person would exercise under the same or similar circumstances. Orth v. Smedley, (1978) Ind.App., 378 N.E.2d 20; DeMichaeli &

13/ It seems obvious that, generally speaking, such a decision will be owed solely to the public.

Associates v. Sanders, (1976) Ind.App., 340 N.E.2d 796; Allied Fidelilty Ins. Co. v. Lamb, (1977) Ind.App., 361 N.E.2d 174. Of course, a layman is generally not exposed to the unique circumstances attendant to police work. It is important, therefore, that the trier of fact consider in its deliberation the particular circumstances involved in a case such as the one before us. By way of explanation, such circumstances might include, among others, the probability of harm to third persons and the gravity of an injury that would result therefrom, the availability of assistance by other police units, and the severity of the criminal conduct of the suspected felon.

Reversed and remanded.

Lybrook, P. J. and Lowdermilk, J., concur.

STATE OF INDIANA

BARTHOLOMEW COUNTY

IN THE BARTHOLOMEW CIRCUIT COURT

SEYMOUR NATIONAL BANK, AS GUARDIAN
FOR TIMOTHY CLYD (SIC) O'SULLIVAN, ET AL

vs

STATE OF INDIANA

Date 2-21-78

No. 24689

(ENTERED FEBRUARY 21, 1978)

ORDER

Plaintiff files Motion to Correct Errors, (H.I.). The Court being sufficiently advised finds that said motion should be denied.

IT IS THEREFORE ORDERED AND ADJUDGED that plaintiff's motion to correct errors be, and the same hereby is, overruled and denied.

Copies to Montgomery, Elsner & Pardieck, P. O. Box 647, Seymour, IN 47274; G. Richard Potter, 219 State House, Indianapolis, IN 46204; Sharpnack, Bigley, David & Rumple; and Locke, Reynolds, Boyd & Weisell, One Indiana Square, Suite 2120, Indianapolis, IN 46204.

/S/ William M. Lienberger
Judge

STATE OF INDIANA,

COUNTY OF BARTHOLOMEW, SS:

IN THE BARTHOLOMEW CIRCUIT COURT

CAUSE NO. 24689

THE SEYMOUR NATIONAL BANK, as Guardian for Timothy Clyde O'Sullivan, THE SEYMOUR NATIONAL BANK, as Special Administrator of the Estate of Deborah O'Sullivan, JOHN L. O'SULLIVAN,
Plaintiffs,

vs.

STATE OF INDIANA,
Defendant

(ENTERED DECEMBER 20, 1977)

SUMMARY JUDGMENT

This cause having been submitted to the Court on the motion for summary judgment filed by the defendant, The State of Indiana, and upon pleadings, interrogatories and answers thereto, and affidavits in support of said motion for summary judgment, and the Court, having heard oral arguments thereon and having considered briefs filed by the parties herein, now finds:

1. On November 28, 1974, Sargent L. Richey (hereinafter Trooper Richey) was employed by the State of Indiana as a State Trooper for the Indiana State Police. Sometime after 11:00 A.M. on said date in the course and scope of his employment, Trooper Richey was on patrol in Jackson County, Indiana near the Uniontown exit of Interstate Highway 65.

2. At about the same time, C. W. Leffler (hereinafter Trooper Leffler) was also on patrol as a State Trooper on Interstate 65, heading in a northerly direction at a location north of Trooper Richey. In the course of his duties Trooper Leffler observed a Chevrolet Nova automobile proceeding southbound on Interstate 65, at what appeared to be an excessive rate of speed and equipped with a rear bumper in violation of the statute regulating bumper heights (IC 1971, 9-8-6-37.5). Because of traffic

conditions Trooper Leffler deemed it inadvisible to move from the northbound lanes to the southbound lanes of Interstate 65 in order to pursue the Nova. Knowing that Trooper Richey was on patrol to the south, Trooper Leffler radioed Trooper Richey and advised him of the situation. Trooper Richey then took up a position at the Uniontown exit on Interstate 65 so that he could observe the Nova as it passed.

3. A short time later, the Nova came into Trooper Richey's view, and although at this time it was not being operated at an excessive rate of speed, the bumper height appeared to be excessive. As soon as traffic permitted, Trooper Richey drove on to Interstate 65 and proceeded to follow the Nova and thereafter decided to stop it for investigation of the rear bumper height.

4. When Trooper Richey was finally able to position his vehicle beind (sic) the Nova, the driver, later identified as John J. Bunce, suddenly pulled around the vehicle in front of him. Immediately he cut back in front of the passed vehicle and maintained a position just a short distance ahead of the passed vehicle. Trooper Richey attempted to follow the Nova, but because of the position of the Nova in relation to the vehicle behind it, he was unable to get his police vehicle in behind the Nova to stop it with the minimum disruption of the traffic flow. After the lapse of some time Trooper Richey was able to get the attention of the driver of the car immediately behind the Nova. This driver reduced his speed permitting Trooper Richey to position his vehicle behind the Nova. He then signalled John Bunce to pull off the driving lane.

5. Trooper Richey stopped his vehicle a short distance behing (sic) the Nova and as he did so he observed what appeared to be bullet holes in the trunk lid. He also noticed that Mr. Bunce seemed to be fumbling with somthing down on the left side of the front seat. He proceeded cautiously to the left front door of the Nova positioning himself so that he could observe both southbound traffic and the movements of Mr. Bunce. When Mr. Bunce was unable to produce either a driver's license or vehicle registration, Trooper Richey requested him to come back to the police car where an identification check could be made. Bunce started to open the door in apparent compliance with Trooper Richey's request, but instead of getting out of the car, Bunce quickly accelerated and drove off at a high rate of speed, bumping and knocking Richey backward.

6. Trooper Richey rushed to his car which at the time was located approximately 1-1/4 to 1-1/2 miles north of the Crothersville exit. As soon as traffic permitted and after activating a flashing red light located atop the police car and the siren, Trooper Richey commenced pursuit. He observed Bunce cut in front of traffic, nearly causing an accident, and then leave Interstate 65 at the Crothersville southbound exit which lead to U. S. 31. As he drove down the ramp, Bunce forced another car off the road. Bunce then disregarded the stop sign at the end of the exit ramp, slid on to U. S. 31, and drove south toward Austin, Indiana.

7. Trooper Richey advised the Seymour State Police Post that he was still in pursuit. In addition to the siren and flashing red light, he turned on the four-way flashers and head

lights. As the two vehicles proceeded south on U. S. 31, they were both traveling at speeds in excess of 100 miles per hour. The distance between the two cars remained about 1/4 of a mile. Trooper Richey observed several vehicles proceeding southbound on U. S. 31 near the northern limits of Austin, and he saw at least two cars leave the road as Bunce passed them.

8. U. S. 31, as it approaches Austin, is upgrade for southbound traffic and then runs downgrade toward the junction of U. S. 31 and State Road 56. Trooper Richey felt it important that he reach the crest of the road before Bunce reached this intersection so that he could observe which road Bunce took. However, Trooper Richey was aware of the potential danger to traffic. He, therefore, reduced his speed to below 100 miles per hour as he approached the

traffic ahead, believing that at the reduced speed he could still make the necessary observation.

9. There were, in fact, three vehicles proceeding south on U. S. 31 at the time Bunce approached Austin. First in line was a Mustang operated by Timothy Clyde O'Sullivan. Second in line was a vehicle operated by David Mains, and third in line was a vehicle operated by Larry Walker. David Mains observed the Nova pass the Walker vehicle. Realizing its excessive speed, he pulled his vehicle off to the right. After Bunce passed the Mains' vehicle, he moved the Nova farther to the left and passed the O'Sullivan vehicle which had not pulled off the road. As soon as the Nova passed him, Mr. Mains pulled his car back on to the road. Almost immediately he heard a siren and shortly thereafter observed a police car approaching him from the rear

with a flashing red light operating. Both Mr. Mains and Mr. Walker yielded to the police car by pulling off the road. The O'Sullivan vehicle continued to proceed south in the driving lane. Trooper Richey moved into the northbound lane to pass the O'Sullivan car. However, shortly before reaching the intersection of U. S. 31 and Wilbur Avenue, Timothy O'Sullivan turned to the left in front of Trooper Richey and the collision occurred.

10. Subsequent to the collision, John Bunce was apprehended in Scottsburg. An examination of the Nova confirmed that the rear of the vehicle was riddled with bullet holes which appeared to be 38 caliber.

11. That on November 28, 1974, Section 3 of the Indiana Tort Claims Act, 34-4-16.5-3, provided in part as follows:

"Section 3. A governmental entity or an employee is not liable if a loss results from:

* * *

(7) The enforcement of, or failure to enforce, a law."

12. That the loss for which claim is made herein resulted from the enforcement of a law by Sargent L. Richey, an Indiana State Trooper employed by the defendant, State of Indiana.

13. That the State of Indiana is immune from civil liability for the losses suffered by the plaintiffs herein.

14. That there is no genuine issue as to any material fact, and the defendant is entitled to a judgment as a matter of law.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant's motion for summary judgment be, and the same hereby is, granted, and,

It is further considered, ordered and adjudged by the Court that plaintiffs recover nothing by their complaint herein.

/S/ William M. Lienberger
Judge, Bartholomew Circuit Court

Copies of this summary judgment to Montgomery, Elsner & Pardieck, P.O. Box 647, Seymour, Indiana 47274; Locke, Reynolds, Boyd & Weisell, One Indiana Square, Suite 2120, Indianapolis, Indiana 46204; G. Richard Potter, Deputy Attorney General, 219 State House, Indianapolis, Indiana 46204; and Sharpnack, Bigley, David & Rumple.

IN THE

SUPREME COURT OF INDIANA

CAUSE NO. 781 S 185

THE SEYMOUR NATIONAL BANK,
As Guardian for Timothy Clyde O'Sullivan,
THE SEYMOUR NATIONAL BANK,
As Special Administrator of the Estate
of Deborah O'Sullivan,
JOHN L. O'SULLIVAN,
Plaintiffs-Appellants

vs.

STATE OF INDIANA,
Defendant-Appellee

Appeal from the
Bartholomew Circuit
Court

The Honorable
William M. Lienberger,
Judge

(FILED APRIL 16, 1982)
NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Seymour National Bank, as Guardian for Timothy Clyde O'Sullivan, The Seymour National Bank, as Special Administrator of the Estate of Deborah O'Sullivan, and John L. O'Sullivan, the appellants above

named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Indiana dated November 24, 1981, which granted appellants' petition for rehearing, and affirmed the judgment of the trial court.

This appeal is taken pursuant to 28 U.S.C., Sec. 1257(2).

MONTGOMERY, ELSNER & PARDIECK

By /S/ Kenneth A. Layton

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CERTIFICATE OF SERVICE

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on the 16th day of April, 1982.

/S/ Kenneth A. Layton
Kenneth A. Layton

STATE OF INDIANA,

COUNTY OF BARTHOLOMEW, SS:

IN THE BARTHOLOMEW CIRCUIT COURT

CAUSE NO. 24689

THE SEYMOUR NATIONAL BANK,
as Guardian for Timothy Clyde O'Sullivan,
THE SEYMOUR NATIONAL BANK,
as Special Administrator of the Estate
of Deborah O'Sullivan,
JOHN L. O'SULLIVAN,
Plaintiffs

vs.

STATE OF INDIANA,
Defendant

(FILED FEBRUARY 21, 1978)
MOTION TO CORRECT ERRORS

The plaintiffs move the court to set aside the findings of fact and conclusions of law and the summary judgment entered on December 20, 1977, on the grounds that:

1. The summary judgment is contrary to law in that as of February 19, 1974, when the Tort Claims Act (IC 34-4-16.5-1 et seq.) was passed, the

plaintiffs had a cause of action against the State, and the Act did not change the common law to immunize the State from liability for losses resulting from its negligence in training and supervising its police officer or for losses resulting from the negligence and/or willful and wanton misconduct of its police officer in performing the ministerial function of taking a misdeamant into custody.

2. The summary judgment is contrary to law because regardless of the scope and extent of the immunity from liability granted to the State and its employees by the Tort Claims Act, the immunity is waived to the extent of the State's insurance coverage.

3. If the Tort Claims Act gives the State absolute immunity from liability for the losses claimed by the plaintiffs, and if this immunity is not

waived to the extent of insurance coverage, then the Act is unconstitutional in that it denies the plaintiffs a remedy for injuries to their person and property as guaranteed by Section 12 of Article I of the Indiana Constitution and it grants privileges and immunities prohibited by Section 23 of Article I of the Indiana Constitution and Section 1 of the Fourteenth Amendment of the United States Constitution.

MONTGOMERY, ELSNER & PARDIECK

By /S/ Kenneth A. Layton

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CERTIFICATE OF SERVICE

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Indiana Square, Suite 2120, Indianapolis, IN 46204; G. Richard Potter, Deputy Attorney General, Office of the Attorney General, 219 State House, Indianapolis, IN 46204; and upon Thomas C. Bigley, Jr., Sharpnack, Bigley, David & Rumple, 321 Washington Street, P.O. Box 310, Columbus, IN 47201, Attorneys for Defendant, on the 20th day of February, 1978.

Kenneth A. Layton

IN THE BARTHOLOMEW CIRCUIT COURT
OF INDIANA

THE SEYMOUR NATIONAL BANK,
as Guardian for Timothy Clyde O'Sullivan,
THE SEYMOUR NATIONAL BANK,
as Special Administrator of the Estate
of Deborah O'Sullivan, and
JOHN L. O'SULLIVAN,
Plaintiffs

vs.

STATE OF INDIANA,
Defendant

CAUSE NO. 24689

(FILED AUGUST 5, 1977)
ANSWERS TO PLAINTIFFS' INTERROGATORIES

* * *

Interrogatory No. 14: At the time of the occurrence, was there any policy or policies of liability insurance or any indemnification or insurance agreement in effect which covered or may cover any of the following:

(a) The State of Indiana;

(b) The vehicle Sergeant Richey occupied at the time of the occurrence;

(c) The operator, owner, lessor and/or lessee of the vehicle Sergeant Richey occupied at the time of the occurrence;

(d) The type of risk or claim upon which the complaint herein is based;

(e) Any judgment which might be entered in this action;

(f) Indemnification of reimbursement for any payments made to satisfy any judgment which may be entered in this action.

Answer: The answer to this interrogatory and all sub-parts is yes.

Interrogatory No. 15: If your answer to the preceding interrogatory is in the affirmative, state as to each policy:

(a) The name and address of the insurer;

(b) The names and addresses of the named insureds;

(c) Who else is covered by each policy;

(d) The number of the policy;

(e) The effective dates thereof;

(f) The nature of the coverage;

(g) The limits of liability, including coverage for one person and coverage for more than one person; and

(h) The name and address of the person or entity having custody of the policy.

Answer:

(a) The Hartford.

(b) The State of Indiana.

(c) Various offices and agencies of the State of Indiana including the Indiana State Police.

(d) 36C719490E.

(e) September 14, 1974 thru September 14, 1975.

(f) Automobile Liability Insurance Coverage for bodily injury and property damage.

(g) $5,000,000.00 Combined Single Limit.

(h) Insurance Division, Department of Administration, Room 502, State Office Building, Indianapolis, Indiana 46204.

* * *

Article I, Section 1, of the

Constitution of Indiana provides that:

> "1. Inherent and inalienable rights. Section 1. WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government."

Section 2-202 of the Illinois Tort Immunity Act provides:

> "A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton negligence."

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE SEYMOUR NATIONAL BANK, ET AL.,
Appellants,

v.

STATE OF INDIANA,
Appellee.

On Appeal From the Supreme Court of Indiana

MOTION TO DISMISS

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May 27, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Section 3(7) of the Indiana Tort Claims Act immunizes the State and its employees from liability for torts committed by such employees while engaged in the enforcement of state law. The statute does not immunize the State or private persons from liability for torts committed by such persons who undertake to enforce state laws independent of any employment relationship with the State. The question presented is whether the statute denies equal protection of the laws to a plaintiff who sues only the State for a tort committed by a state law enforcement officer.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT	1
THE APPEAL SHOULD BE DISMISSED	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

Campbell v. *State*, 259 Ind. 55, 284 N.E.2d 733 (1972)	4
G.D. Searle & Co. v. *Cohn*, 50 U.S.L.W. 4243 (U.S. Feb. 24, 1982)	6
Geduldig v. *Aiello*, 417 U.S. 484 (1974)	6
Harris v. *Pennsylvania Turnpike Commission*, 410 F.2d 1332 (3d Cir. 1969)	5
Logan v. *Zimmerman Brush Co.*, 50 U.S.L.W. 4247 (U.S. Feb. 24, 1982)	5
Martinez v. *California*, 444 U.S. 277 (1980)	5, 6
O'Neill v. *Pennsylvania*, 459 F.2d 1 (3d Cir. 1972)	5
Palmer v. *Ohio*, 248 U.S. 32 (1918)	4
Street v. *New York*, 394 U.S. 576 (1969)	4

Statutes:

Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671-80 (1976)	5
Indiana Tort Claims Act, Indiana Code 34-4-16.5-3(7)	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1999

THE SEYMOUR NATIONAL BANK, ET AL.,
Appellants,

v.

STATE OF INDIANA,
Appellee.

On Appeal From the Supreme Court of Indiana

MOTION TO DISMISS

STATEMENT

Appellants sued the State of Indiana in Bartholomew County Circuit Court for damages stemming from an accident involving a car driven by a State Trooper while he was engaged in enforcing state law. The trial court granted summary judgment for the State on the grounds that it was immune from suit under Section 3(7) of the Indiana Tort Claims Act, which provides that "[a] governmental entity or an employee is not liable if a loss results from * * * the enforcement of * * * a law." (J.S. App. 85a-95a.)[1]

The Indiana Court of Appeals ruled that the trial court had misconstrued the statute and reversed in a

---

[1] Indiana Code 34-4-16.5-3(7). The term "governmental entity" is defined in the statute to include the State itself. (J.S. 6.)

decision based wholly on state law grounds. (J.S. App. 47a-83a.) The Supreme Court of Indiana in turn reversed the Court of Appeals and reinstated the ruling of the county circuit court. (*Id.* 18a-45a.) The majority and dissenting opinions all discussed only the meaning of the state act; none mentioned any federal constitutional issue.

On rehearing the state Supreme Court among other things addressed appellants' federal constitutional claim, which was made in virtually a single sentence (*id.* 9a):[2]

> " '[Appellants] submit that there is no rational basis for a classification which immunizes an employee of a governmental entity, with or without statutory arrest powers, for damages caused by his conduct while leaving all other citizens of the State, who are not employed by a governmental entity, liable for damages resulting from their conduct in exercising their right to enforce the law.' "

The court rejected the argument, ruling (*id.*):

> "[Appellants'] argument assumes that the statute applies to cases which are not before us. [Their]

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[2] Throughout this case appellants' constitutional argument has been abbreviated and unexplained. In their motion to the trial court for reconsideration of its summary judgment ruling appellants for the first time made a constitutional claim, without citation to authority or further elaboration, that Section 3(7) "grants privileges and immunities prohibited by * * * the Fourteenth Amendment of the United States Constitution." (J.S. App. 101a.) In their main brief in the Indiana Court of Appeals appellants made a similarly succinct and unadorned constitutional argument. In their reply brief in that court they made no federal claim. Nor did they in their main brief in the Indiana Supreme Court, where they said (at page 4) that "the only issue to be decided on appeal in this case is whether the legislature intended to change the common law of Indiana" by passing Section 3(7). In their first motion for reconsideration appellants' constitutional argument consisted of the sentence quoted by the Indiana Supreme Court and reproduced above. In their second petition for rehearing appellants made no federal claim.

complaint was not against a citizen but against the State."

Appellants filed a second petition for rehearing in the Indiana Supreme Court, in which they made no constitutional claim and which was denied (J.S. App. 16a), whereupon they appealed to this Court.

THE APPEAL SHOULD BE DISMISSED

1. Section 3(7) of the Indiana statute immunizes the State in cases of loss stemming from actions of a state employee who is engaged in law enforcement. It also immunizes the state employee.

By contrast, private citizens who undertake to enforce state laws, independent of any employment relationship with the State, are not immune from liability for their torts. The result is that, in cases where a tort occurs during the course of law enforcement, victims may recover from a tortfeasor who is not a state employee but they cannot recover from a tortfeasor who is a state employee. That distinction seems to be the subject of appellants' equal protection challenge.[3]

But as the Indiana Supreme Court correctly noted, appellants may not complain of the distinction between different victims' ability to recover from individual tortfeasors, for appellants sued only the State. No victims of torts committed in the course of law enforcement may recover against the State, regardless of the identity of the tortfeasor. If the tortfeasor is an employee then the State is immune under Section 3(7). If the tortfeasor is

---

[3] See pages 15-16 of the Jurisdictional Statement:

"A victim of a tort committed by anyone who is not acting as an employee of the State of Indiana or any other governmental entity may be compensated for damages. However, a victim of an identical tort committed by anyone acting within the scope of his employment by the State or any other governmental entity is barred from being compensated for damages. The question is whether this difference in the treatment of victims' torts is rational * * *."

not an employee then there is no basis on which the State may be held liable.

In short, by precluding recovery against the State for torts by state employees engaged in law enforcement, Section 3(7) does not treat victims of such torts any differently from victims of identical torts committed by nonemployees, for those victims also may not sue the State. The statute does, by immunizing the state employee as well as the State, distinguish between victims' right to recover from the individual tortfeasor, but since appellants have sued only the State the question whether that distinction violates the Equal Protection Clause is not presented in this case.

2. Appellants argue that, since the Indiana statute immunizes state employees who commit torts during the course of law enforcement, and since the State has insurance covering torts for which the State has agreed to be liable, there is no rational reason for the State to immunize itself in cases such as this one. (J.S. 20-22.) That is not in terms an equal protection argument since, for the reasons stated above, the statute does not treat appellants differently from any person who sought to recover against the State for a tort committed in the course of law enforcement. Rather, it appears to be essentially a due process challenge to the State's decision to immunize itself for torts committed by its law enforcement officers. The question whether Section 3(7) violates due process, however, was not presented to or decided by the courts below and is therefore beyond this Court's jurisdiction. *E.g.*, *Street* v. *New York*, 394 U.S. 576, 581-582 (1969).

3. In any event, Section 3(7) does not offend the Due Process Clause. In *Campbell* v. *State*, 259 Ind. 55, 284 N.E.2d 733 (1972), the state Supreme Court abolished common law sovereign immunity in Indiana.[4] That

[4] The existence of sovereign immunity *per se* does not offend the Constitution. *Palmer* v. *Ohio*, 248 U.S. 32 (1918) (rejecting a

opened the door to suits against the State in cases such as this one, but the enactment of Section 3(7) closed it again. That was not unconstitutional. Earlier this Term this Court ruled that "the legislative determination provides all the process that is due" when the State extinguishes a cause of action. *Logan* v. *Zimmerman Brush Co.*, 50 U.S.L.W. 4247, 4250 (U.S. Feb. 24, 1982) (slip op. 10). "[T]he State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether," for "it 'remain[s] true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.' *Martinez* v. *California*, 444 U.S. [277], 282 (1980)." *Id.* (slip op. 9, 10).

Section 3(7) is not "wholly arbitrary or irrational." [5] The business of law enforcement is both dangerous and unpredictable. The State may reasonably believe that the actions taken by its employees engaged in that occupation will give rise to frequent claims for liability in tort. And the State may legitimately protect itself against the inconvenience of defending against those claims and the expense either of paying judgments on

---

claim that the State's immunity from suit violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth); *O'Neill* v. *Pennsylvania*, 459 F.2d 1, 2 (3d Cir. 1972) (dismissing a claim that sovereign immunity violates the Equal Protection Clause as "frivolous in view of *Palmer* v. *Ohio*"); *Harris* v. *Pennsylvania Turnpike Comm'n*, 410 F.2d 1332, 1336 (3d Cir. 1969).

[5] The Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671-2680 (1976), contains an exception for liability similar to (although narrower than) the exception stated in Indiana's Section 3(7). The federal exception covers "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation * * *." 28 U.S.C. 2680(a) (1976).

those claims or of insuring itself against having to pay those judgments. Whether one agrees or disagrees with Indiana's decision, "one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor." *Martinez, supra*, 444 U.S. at 283.[6]

In sum, since Section 3(7) does not treat appellants differently from anyone else who would sue the State for a loss arising from law enforcement, appellants may not claim that they are denied equal protection of the law. They did not raise and the courts below did not pass on a due process challenge to Section 3(7), for which reason this Court has no jurisdiction, and such a challenge in any event does not present a substantial federal question.[7]

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[6] That analysis, leading to the conclusion that the statute is not irrational or arbitrary, is essentially the same analysis as would be called for under the Equal Protection Clause (had appellants stated a cognizable claim under that Clause) and would lead to the same conclusion in favor of the statute's constitutionality. Since there is no suggestion that Section 3(7) is a "mere pretext[] designed to effect an invidious discrimination against" any class of persons identifiable by race or other suspect category (*Geduldig* v. *Aiello*, 417 U.S. 484, 496-97 n.20 (1974)), and since it does not "impinge[] upon fundamental rights" (*G.D. Searle & Co.* v. *Cohn*, 50 U.S.L.W. 4243, 4244 (U.S. Feb. 24, 1982) (slip op. 4)), Section 3(7) must "be upheld against equal protection attack [because] it is rationally related to the achievement of legitimate governmental ends" (*id.*).

[7] While it is not necessary to our position, we note that appellants appear to err in stating that the decision of the Indiana Supreme Court upheld immunity under Section 3(7) even for acts that are "done maliciously, willfully, or with wanton disregard for public safety" (J.S. 24). The state Supreme Court ruled that acts undertaken in the course of law enforcement that are "so outrageous as to be incompatible with the performance of the duty undertaken" are not immunized by Section 3(7) (J.S. App. 4a), and Justice Hunter, concurring and dissenting, took that to mean that the majority had concluded "that the scope of immunity established

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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May 27, 1982

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by [Section 3(7)] does not embrace conduct of a willful and wanton nature" (*id.* 11a-12a).

We also note that Section 3(7) was amended in 1976 to exclude from the scope of immunity any acts taken in the course of law enforcement that constitute false arrest or false imprisonment. See J.S. App. 3a.

Appellant's Reply Brief

No. 81-1999

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE SEYMOUR NATIONAL BANK,
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THE SEYMOUR NATIONAL BANK,
As Special Administrator of the Estate
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and JOHN L. O'SULLIVAN
Plaintiffs-Appellants

v.

STATE OF INDIANA,
Defendant-Appellee

On Appeal from the Supreme Court of Indiana

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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TABLE OF AUTHORITIES

Cases: **Page**

Campbell v. State (1972), 259 Ind. 55, 284 N.E.2d 733 3

Evansville & Terre Haute Railway Co. v. McKee (1895), 99 Ind. 519 4

Indiana Tort Claims Act 1, 2, 4

Indiana Tort Claims Act, Section 3(7) 2

Mock v. Polley (1946), ___ Ind.App. ___, 66 N.E.2d 78 4

Oakland City Agricultural & Industrial Society v. Bingham (1892), 4 Ind.App. 545, 31 N.E. 383 4

Roberts v. State (1974), ___ Ind.App. ___, 307 N.E.2d 501 3

The Pittsburgh, Cincinnati & St. Louis Railway Co. v. Kirk (1885), 102 Ind. 399, 1 N.E. 849 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1999

THE SEYMOUR NATIONAL BANK,
As Guardian for Timothy Clyde O'Sullivan,
THE SEYMOUR NATIONAL BANK,
As Special Administrator of the Estate
of Deborah O'Sullivan,
and JOHN L. O'SULLIVAN
Plaintiffs-Appellants

v.

STATE OF INDIANA,
Defendant-Appellee

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Although the appellants' position on the merits is adequately set forth in the Jurisdictional Statement, the appellants think it desirable to reply to the appellee's misinterpretation of the basis for the appellants' equal protection challenge of the Indiana Tort Claims Act and to the appellee's misinterpretation of that part of the decision of the Indiana Supreme Court (J.S. App. 1a-4a) which grants immunity to the State and its employees for all torts, including intentional torts, which are committed while a State employee is acting within the scope of his employment.

The appellants pointed out on pages 15 and 16 of the Jurisdictional Statement that the interpretation of the Indiana Tort Claims Act as stated by the Indiana Supreme Court creates different consequences for victims of torts. More specifically, a victim of a tort committed by anyone who is not acting as an employee of the State of Indiana or any other governmental entity may be compensated for damages. However, a victim of an identical tort committed by anyone acting within the scope of his employment by the State or any other governmental entity is barred from being compensated for damages.

On page 3 of the motion to dismiss, the appellee has rephrased this distinction as follows:

> "Section 3(7) of the Indiana statute immunizes the State in cases of loss stemming from actions of a state employee who is engaged in law enforcement. It also immunizes the state employee.
>
> By contrast, private citizens who undertake to enforce state laws, independent of any employment relationship with the State, are not immune from liability for their torts. The result is that, in cases where torts occur during the course of law enforcement, victims may recover from a tortfeasor who is not a state employee but they cannot recover from a tortfeasor who is a state employee. That distinction seems to be the subject of appellants' equal protection challenge."

This misstatement of the distinction pointed out in the Jurisdictional Statement was apparently made to serve as the basis for the appellants' argument that appellants may not complain of the distinction between different victims' ability to recover from individual tortfeasors, because the appellants sued only the State.

Implicit in the distinction set forth in the Jurisdictional Statement is the fact that under Indiana law, an employer is liable for the torts of an employee under the theory of respondeat superior. This theory of liability also applies to

the State of Indiana. *Roberts v. State* (1974), ____ Ind.App. ____, 307 N.E.2d 501; *Campbell v. State* (1972), 259 Ind. 55, 284 N.E.2d 733. Therefore, even though the appellants filed a complaint against the State and not the State's employee, the question presented remains the same: Is there a rational basis for immunizing the State from liability to victims of negligent, willful, wanton or intentional torts, committed by State's employees who are attempting to enforce a law, when the State's liability in tort is limited to $300,000.00 per person and $5,000,000.00 per occurrence, where the State's employees have absolute immunity, and where the State has purchased insurance which provides $5,000,000.00 for the victim's damages?

The appellee's suggestion contained in footnote 7 on page 6 of the motion to dismiss that the appellants have erred in stating that the decision of the Indiana Supreme Court includes immunity for acts that are done maliciously, willfully, or with wanton disregard for public safety, is supported by a quote from the Supreme Court's decision on rehearing (J.S. App. 4a) which is taken out of context. The Supreme Court held (J.S. App. 4a) that:

> "If the injury in question resulted from the enforcement of a law, immunity is granted to both the governmental entity and to the employee, notwithstanding that the enforcement resulted in a loss that would not have occurred but for the negligent manner in which the duty was performed. However, an employee's acts, although committed while engaged in the performance of his duty, might be so outrageous as to be incompatible with the performance of the duty undertaken. In such a case, it cannot be said that an injury resulting therefrom resulted from the performance of the duty. Such acts, whether intentional or willful and wanton, are simply beyond the scope of employment."

The foregoing quotation does nothing more than state that an employer is not liable for the acts of the employee that are beyond the scope of employment. However, it is the law

in Indiana that the test of whether an employee is engaged in accomplishing an end which is within the scope of employment is whether he adopts a means reasonably intended to accomplish the end. This is the applicable test regardless of the motives which induce the adoption of the means, and even though the means employed are outside the employee's authority, and even though the act be ill-advised or malicious, and regardless of whether the particular act was or was not directly authorized. *Mock v. Polley* (1946), ___ Ind.App. ___, 66 N.E.2d 78; *The Pittsburgh, Cincinnati & St. Louis Railway Co. v. Kirk* (1885), 102 Ind. 399, 1 N.E. 849; *Oakland City Agricultural & Industrial Society v. Bingham* (1892), 4 Ind.App. 545, 31 N.E. 383; *Evansville & Terre Haute Railway Co. v. McKee* (1895), 99 Ind. 519.

The appellants submit that there exists a substantial federal question as to whether there is any rational basis for the distinction created by the Indiana Tort Claims Act in a tort victim's ability to recover for damages, and the appellant's request that the appellee's motion to dismiss be denied and that probable jurisdiction be noted.

Respectfully submitted,

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